TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 28

JULIA ECKENRODE, ADMINISTRATRIX OF THE ESTATE OF JOHN HENRY ECKENRODE, DECEASED, PETITIONER,

vs.

PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 24, 1943.

CERTIORARI GRANTED APRIL 5, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 28

JULIA ECKENRODE, ADMINISTRATRIX OF THE ESTATE OF JOHN HENRY ECKENRODE, DECEASED, PETITIONER,

vs.

PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 28, 1948.

—6663

[fol. a]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9330

JULIA ECKENRODE, Administratrix of the Estate of John Henry Eckenrode, Deceased, Appellant,

vs.

PENNSYLVANIA RAILROAD CO., Appellee

Appeal from the Judgment of the District Court of the United States for the Eastern District of Pennsylvania

Appendix for Appellant—Filed February 7, 1947

[fol. 1] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

1946

Jan. 17. Complaint filed.
Jan. 17. Summons exit.
Jan. 17. Plaintiff's demand for jury trial, filed.
Jan. 25. Summons returned: "On Jan. 18, 1946 served" and filed.
Jan. 25. Appearance of Philip Price, Esq., for defendant filed.
Feb. 8. Answer, filed.
Feb. 15. Order to place case on trial list, filed.
Sept. 19. Appearance of Richter, Lord & Farage, Esqs., for plaintiff, filed.
Oct. 29. Jury called and sworn.
Oct. 29. Trial—witnesses sworn.
Oct. 30. Trial resumed.
Oct. 30. Verdict in favor of plaintiff in sum of $10,000.
Oct. 30. The jury answers certain interrogatories. (See minutes.)
Oct. 30. Judgment in favor of plaintiff in sum of $10,000, filed. 10-31-46 noted and notice mailed.

Oct. 30. Plaintiff's Points for Charge filed.
Oct. 30. Defendant's Points for Charge filed.
Nov. 7. Defendant's motion for directed verdict filed.
Nov. 7. Testimony filed.
Nov. 8. Defendant's motion to set aside verdict and judgment filed.
Nov. 12. Order of Court staying execution pending disposition of motion for judgment N. O. V. filed. 11-13-46 noted and notice mailed.
Nov. 13. Order of Court directing marshal to furnish jurors with meals, filed.
Dec. 2. Hearing sur motion to set aside verdict etc. C A V

[fol. 2] 1947

Jan. 7. Opinion, Kirkpatrick J., granting defendant's motion for judgment filed.
Jan. 7. Judgment setting aside verdict and judgment in favor of plaintiff and entering judgment in favor of defendant filed. 1-8-47 noted and notice mailed.
Jan. 10. Plaintiff's Notice of Appeal, filed.
Jan. 10. Copy of Clerk's notice to U. S. Circuit Court of Appeals, filed.
Jan. 15. Appellant's Designation of Contents of Record on Appeal.

IN UNITED STATES DISTRICT COURT

COMPLAINT

Plaintiff complains and alleges:

1. This action arises under the Act of Congress, April 22, 1908, c. 149; 35 Stat. 65, and amendments thereto, U. S. C. A., Title 45, sec. 51 et seq., and further amended by the Act of Congress approved by the President of the United States on August 11, 1939, Chapter 685—1st Session of the 76th Congress, known and cited as "The Federal Employers' Liability Act", and under the Safety Appliance Acts; Title 45, U. S. C. A., Sec. 1-23, inclusive.

2. That at all times herein mentioned the Pennsylvania Railroad Company was and now is a railroad corporation duly organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania.

3. That at the time and place herein mentioned in paragraph 4, and for a long time prior thereto, the defendant, [fol. 3] as a common carrier operated, by electric and steam power, trains carrying passengers, freight, express packages, baggage, foreign and domestic mail in commerce between the different States of the United States and its territories.

4. That on or about October 8, 1943, the plaintiff's decedent was employed as a brakeman on a train of the defendant at or near Hastings, Pennsylvania, when, due to the negligence of the defendant, its agents, servants or employees, and the violation of Section 23 of Title 45, U. S. C. A., he suffered fatal injury.

5. At the time and place herein mentioned, the plaintiff's intestate and the defendant were engaged in interstate commerce between the different States of the United States and its territories.

6. At the time and place aforementioned, the said train was under the control of the defendant's agents, servants or employees who were then and there acting within the course and scope of their employment with the defendant and were under the direct and exclusive control of the defendant herein. Said accident was due in no manner whatsoever to any act or failure to act on the part of the plaintiff's decedent.

7. The defendant company, by its servants, agents or employees, was negligent at the time and place aforesaid, in that:

(a) it failed to provide a safe place to work;

(b) it failed to give warning of the proposed move;

(c) it failed to await signals from the deceased;

(d) it violated the Company rules regarding the movement then and there intended;

(e) it failed to provide adequate light;

(f) it improperly directed the decedent to perform the [fol. 4] duty then performed by him under the circumstances then and there present which presented too great a hazard and probability of injury;

(g) negligent at law.

8. At the time and place aforementioned, all the trackage, train, embankments and equipment were owned and under the exclusive and direct control of the said defendant.

9. As a result of the accident aforementioned, the deceased underwent great conscious pain and suffering from the time of the accident until he died.

10. The deceased left surviving him his widow, Julia Eckenrode, and his invalid daughter, Rita, both of whom have been deprived of the earnings, maintenance and support that they would have received from the deceased for the remainder of his natural life, had he not met with this accident which resulted in his death.

11. As a result of the accident above mentioned, Rita Eckenrode, has been deprived of the guidance, counsel and help of her father, the late John Henry Eckenrode, upon whom she was dependent because of her physical condition, during the remainder of his natural life, to her great detriment and loss.

12. On the 10th day of May, 1944, the plaintiff, Julia Eckenrode, was appointed administratrix of the Estate of John Henry Eckenrode, by the Register of Wills of Cambria County, Pennsylvania.

13. Plaintiff's intestate left surviving him his widow, Julia Eckenrode, and his invalid daughter, Rita, who have [fol. 5] been damaged by his death in the sum of $100,000.00, together with the costs of this action.

Hence this suit.

—— ——, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER TO COMPLAINT

The Defendant, in answer to the Complaint filed herein, avers:

1. Defendant admits that the action arises under the Federal Employers' Liability Act but denies that the said action arises under the Safety Appliance Acts or that the said Safety Appliance Acts have any application thereto.

2. Admitted.

3. Admitted.

4. Defendant admits that on October 8, 1943, the Plaintiff's decedent was employed by it as a brakeman on one of its trains, at or near Hastings, Pennsylvania, but denies the remaining averments of paragraph 4 of the Complaint.

5. Admitted.

6. The Defendant denies that the fatal injuries alleged to have been sustained by Plaintiff's decedent were caused by any acts of omission or commission by the agents, servants or employees of the Defendant acting in the course [fol. 6] and scope of their employment and further denies the averment that the injuries to Plaintiff's decedent were due in no manner to any act or failure to act on the part of plaintiff's decedent.

7. Defendant denies that the Defendant, its servants, agents or employees were negligent in any of the respects averred in paragraph 7 of the Complaint or in any other respect whatsoever.

8. Admitted.

9. Defendant has no knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 9 of the Complaint.

10. Defendant has no knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 10 of the Complaint.

11. Defendant has no knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 11 of the Complaint.

12. Defendant has no knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 12 of the Complaint.

13. Defendant has no knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 13 of the Complaint.

Second Defense

Defendant avers that the sole and proximate cause of the fatal injuries to Plaintiff's decedent was the Plaintiff's decedent's own negligence.

(S.) Philip Price, Attorney for Defendant.

[fol. 7] IN UNITED STATES DISTRICT COURT

Transcript of Trial Proceedings—Filed November 7, 1946

Philadelphia, Pa., October 29, 1946.

Before Hon. William H. Kirkpatrick, J., and a Jury

Present:

Richter, Lord & Farage, Esqs., by B. Nathaniel Richter and Joseph S. Lord, 3d, Esq., for Julia Eckenrode.

Philip Price, Esq., by Owen B. Rhoads, Esq., for Pennsylvania Railroad Company.

(The jury was duly impaneled and sworn.)

The Court: Proceed, Mr. Richter.

Mr. Richter: Thank you, sir.

(Mr. Richter opened the plaintiff's case to the jury.)

The Court: Do you wish to state your case now or do you want to reserve it?

[fol. 8] Mr. Rhoads: I will reserve it, if Your Honor please.

The Court: Proceed, Mr. Richter.

PLAINTIFF'S EVIDENCE

Mr. Richter: Mr. Ingoldsby.

W. J. INGOLDSBY, having been duly sworn, was examined and testified as follows:

By Mr. Richter:

Q. Mr. Ingoldsby, where you live?

A. (No answer.)

Q. Where do you live, sir?

A. Cresson, Pennsylvania.

Q. Do you have difficulty in hearing me, Mr. Ingoldsby?

Mr. Richter: May I, with Your Honor's permission, come up close to him? He apparently does not hear me well.

By Mr. Richter:

Q. You live in Cresson, Pennsylvania?

A. That is right.

Q. Now, at the time of the accident in this case by whom were you employed?

A. By the Pennsylvania Railroad Company.

[fol. 9] Q. In what capacity?

A. Engineer.

The Court: We do not have the date.

By the Court:

Q. What was the date on which Mr. Eckenrode was killed?

A. On the 8th day of October.

By Mr. Richter:

Q. What year?

Mr. Rhoads: 1943, Your Honor.

The Witness: 1943.

By the Court:

Q. And you were the engineer?

A. Yes.

By Mr. Richter:

Q. Mr. Ingoldsby——

The Court: Let me get one thing more clear.

By the Court:

Q. What time of the day was it?

A. About 12:10 P. M.

Q. Was it a clear day?

A. It was.

[fol. 10] The Court: All right.

By Mr. Richter:

Q. Mr. Ingoldsby, you were the engineer on which engine?

A. 603.

Q. And what kind of work were you doing with that engine that day?

A. We were shifting the mines.

Q. Suppose you tell the Court and jury what you mean by shifting the mines.

A. Picking up and placing cars at mine sidings.

Q. Are you still employed by the railroad company?

A. No, I am retired.

Q. You are retired now?

A. Yes.

Q. Where were you moving from, from what point to what point?

A. We go from Cresson to Hastings.

Q. Hastings Fuel?

A. We go up to Hastings town and we work Hastings Fuel.

Q. Is Hastings Fuel between Hastings and Cresson?

A. Yes, it is along the branch. It is a branch road off the main line, about six or seven miles off the main line at Hastings.

Q. Do you go along and pick up loaded coal cars from the mines?

A. We take our empty cars and place them at the mines all the way up to Hastings branch and on the way back we pick up loaded cars.

Q. What were you doing on this occasion, picking up loaded cars or taking up empty ones?

A. Picking up loaded cars.

Q. What direction was your engine facing?

[fol. 11] A. It was facing, that would be east, I guess, on the branch.

Q. Were you headed back towards Cresson?

A. Coming back towards Cresson, yes.

Q. As you were coming back towards Cresson, which way is the track, going up or down, in the direction towards Cresson?

A. Coming down from Hastings?

Q. Where was your engine?

A. Well, that is where our engine was, on the rear of the train.

Q. You were on the rear of the train?

A. Yes.

Q. Was your engine the pusher engine or the main engine?

A. This was the pusher engine.

Q. You were on the pusher engine?

A. Yes, sir.

Q. Had you collected any cars by the time you got to Hastings Fuel?

A. Yes, we had picked up cars at all the mines beyond Hastings Fuel.

Q. How many cars had you picked up?

A. I believe there must have been eighteen or twenty. I couldn't say how many cars we had left standing on the main track.

Q. Was this before you picked up cars at Hastings Fuel?

A. Yes, sir.

Q. Was your engine at the back end of these cars?

A. Yes, we were at the back end.

Q. Which way were you facing?

A. Well, we were headed, we were coming down tank first from Hastings, and cabin behind the engine.

Q. Did you go into Hastings Fuel to pick up some cars?

A. Yes, sir.

Q. How many cars did you pick up at Hastings Fuel?

A. I believe it was four, I am not positive.

[fol. 12] Q. Where did you put these four cars?

A. We put them up against the cars to be left standing on the main track.

Q. Where did you put them in relation to your engine, on the back or the front of your engine?

A. On the front of the engine.

Q. In other words, the front of your engine moved up against these cars lying on Hastings Fuel track?

A. Yes, sir.

Q. And then you coupled to those cars?

A. Yes.

Q. Then did you pull them out of Hastings Fuel?

A. Yes.

Q. You backed out of Hastings Fuel onto the main track?

A. Yes.

Q. After you backed out of Hastings Fuel did you have the switch thrown for you at Hastings Fuel?

A. Yes, sir.

Q. And that was to line the track ahead on the main track, is that right?

A. Absolutely.

Q. Then, did you push those cars against the other cars?

A. Yes, sir, up against the cars we had left standing there.

Q. How many cars did you have altogether?

A. I think it was 22 cars all told.

By the Court:

Q. Wait a minute. You say you pushed those against cars you had standing there?

A. Yes, we had left, I believe it was, 18 cars standing on the main track, and we got four more cars and put the four up against those.

By Mr. Richter:

Q. You had 22 altogether, and what was in back of your engine?

[fol. 13] A. Just a cabin.

Q. There was a cabin?

A. We call it a caboose.

Q. Who sits in there?

A. Well, that is the trainman.

Q. Mr. Eckenrode's position would be in there, would it not?

A. That is where he was.

Q. Tell us who were the members of the engine and train crew on this movement and their positions.

A. Well, the conductor was Mr. Nagle—D. E. W. I believe are his initials, and Joe McGowan was the brakeman.

Q. Which brakeman was he?

A. He was the middle brakeman. Mr. Patterson was the front brakeman, and Mr. Eckenrode was the flagman.

Q. Where would Eckenrode be?

A. On the rear of the train.

Q. And that would put him in the caboose?

A. Yes.

Q. Was there another engine connected with this outfit further up the track?

A. The hauler, yes.

Q. It was not connected onto the train as yet, was it?

A. It wasn't with these cars that we collected.

By the Court:

Q. Was he waiting for you?

A. He was working another mine.

By Mr. Richter:

Q. Up above?

A. Yes.

Q. Was he waiting for you to get up to him with your cars?

A. No, after he pulled those cars down they put him into [fol. 14] the siding. Then we shifted these cars up and coupled up to the cars that he brought from the other mine, and then we pulled all these cars past the other mine, ready to let him pass.

Q. You were going to push these 22 cars uphill to what point?

A. Well, to the Red Top mine.

Q. How far is that?

A. I would think it would be where we stood and where he stood, it wouldn't be more than five cars from where he left his cars and where we left the ones on the main track that we left.

Q. How many feet would you say that was? 250 feet, about?

A. Well, I guess it would be that, yes. I don't know just what the length of a car is, 40 feet or something.

By the Court:

Q. How many car lengths would you have to push?

A. About five car lengths, I judge. We had pushed the cars about four when this happened.

By the Court:

Q. What is a car length?

Mr. Rhoads: 40 feet.

By Mr. Richter:

Q. About 200 feet then, you had to go?

A. Yes.

Q. Were these cars empty or full?

A. They were loaded cars.

Q. Loaded with what?

[fol. 15] A. Coal.

Q. What kind of cars were they?

A. Well, they were mixed cars.

The Court: Pardon me, so that I get it straight.

By the Court:

Q. When you were pushing these cars five car lengths, what were you going to couple with? Were you going to couple with something?

A. These five cars.

Q. Your 22 cars that you were pushing, you said you had about five car lengths to push them.

A. Five car lengths from where the hauler, the other engine, would leave his cars.

Q. Were there cars there?

A. From another mine.

Q. Were there then?

A. Yes.

Q. There were other cars there waiting for you to couple on?

A. Yes, sir.

By Mr. Richter:

Q. Tell us whether the track going up towards Red Top is upgrade or not.

A. Yes, it is a little uphill. I don't know what per cent.

Q. It is a pretty good grade, is it not?

A. Well, it is a pretty good grade up there.

Q. How about the track that goes into——

A. Hastings Fuel?

Q. Hastings Fuel.

A. Yes, it goes down into a dip.

Q. That goes down somewhat, does it not?

[fol. 16] A. Yes.

Q. As the two tracks come together they form a V, do they not?

A. That is right.

Q. What is there between the track going into Hastings Fuel and the point where the other track goes ahead, is that a sort of an embankment there?

A. Yes, sir, a little.

Q. About how high would you say it was when you moved away from Cresson, say 25 feet from the point where the switchpoint is, how high is it from the main track down to the point where you would meet Hastings Fuel track? How many feet above it?

A. Well, I don't know, I would say five or six feet, from recollection.

Q. What have you got in there? Is it——
A. It is dirt and cinders.
Q. Cinders, is that right?
A. Yes, sir.
Q. Where did those cinders come from?
A. The company put them in there for filling.
Q. The company put them in there, did they not?
A. Yes.
Q. You were the engineer?
A. Yes, sir.
Q. What side of the engine do you sit on?
A. On the right side.
Q. You do?
A. Yes.
Q. And where is the fireman?
A. He sits on the left side.
Q. Who works the sander in an engine?
A. Who what?
Q. Who works the sander in an engine?
A. A sanding engine——
Q. Who works the sanding apparatus on an engine, you or the fireman?

[fol. 17] By the Court:

Q. The sanding apparatus, the sander you sand the tracks with, who works that?
A. Who sands that? The engineer sands that.
Q. You say the engineer sands it?
A. Yes, he has a sand valve on the engine.
Q. You said the engineer?
A. Yes.

By Mr. Richter:

Q. Who works the sander, the engineer or the fireman?
A. The engineer.
Q. You are the man who operates the sander?
A. Yes, the man that operates the engine.
Q. After you coupled your cars on the engine, what did you try to do?
A. From Hastings Fuel?
Q. Yes.
A. When we went in there, why, I knowed we were going to have these cars to push up and it is the custom of an

engineer always to look if the sander is working. I said to the fireman, "I am going down to see if the sand is working good, and you can couple up these cars and make the test."

Q. Do you have to get out of an engine to see if the sanders are working?

A. You do, yes.

Q. Don't you have an indication inside?

A. You can't see whether that sand is coming out of the pipe on the engine.

Q. Don't you know that the sander is supposed to be so located over the track that the sand comes right down on the track?

A. Yes.

[fol. 18] Q. That is supposed to be that way, is it not?

A. Yes, the pipe should come on the track.

Q. No matter whether you are on a curve or a straightaway, that pipe is supposed to be over the track so you can get traction.

A. It just don't hit that way sometimes.

Q. Would that be because the sander is defective or the pipe not lined straight?

A. Well——

Q. You can tell, sitting right in the cab of your engine, whether or not the sand is coming out of your sand box, can you not?

A. No, you can't. You can see if you hang out of the window, yes.

Q. I mean sitting in your regular seat, Mr. Ingoldsby, in your engine, can't you tell whether or not that sand is going through to the ground?

A. No, you can't tell, you can't see it, not from the engine. Not from the engine cab, you can't.

Q. Sitting in your engine do you have any indications to tell you whether the sander is working right or not?

A. (No answer.)

Q. What is your answer to that?

A. I didn't get your question.

Q. Sitting——

By the Court:

Q. Is there any way, when you sit in your engine, without getting out of the engine, that you can tell whether the sand is coming down on the tracks or not?

A. Not without you look out and see it.

Q. You could look out the cab window, could you?

A. Out the cab window.

By Mr. Richter:

Q. And you could see right from there whether or not the sand is coming out, could you not?

[fol. 19] A. Sure.

Q. When you push that button, what is supposed to happen with the sand?

A. It is an air valve that blows this—an air valve that blows this sand from the sand box, down into a trap, and blows it out of the trap into the pipes.

Q. What do you have, a lever or a button?

A. A little valve.

Q. When you turn that valve what does that set in motion?

By the Court:

Q. What happens when you turn the valve?

A. That is the air.

Q. Yes.

A. The air goes to the sand box.

By Mr. Richter:

Q. The air valve does what?

A. Blows air to the sand box to blow sand down there.

Q. That is what is supposed to happen. The sand goes through what?

A. Through a trap and through a pipe down onto the rail.

Q. You are supposed to do that up sitting in your engine?

A. Yes, it is a valve.

Q. Did the sand go down when you pushed this button?

A. Yes, it goes down.

Q. Did it on this occasion go down when you pushed this button?

A. If your sand pipes are not plugged up it will.

Q. What happened when you did? Did you push the button? Did you push it?

[fol. 20] A. Yes, sir.

Q. Did you slip?

A. Yes.

Q. How many times did you slip?

A. I can't say how many times we did slip. I don't remember.

Q. Tell us how many feet you would move before you you would get stuck again.

A. We would move the cars, maybe the engine would move maybe a half car length or so, and then the engine would start to slip a little, and, of course, we would shut the throttle off and throw the thtrottle out again and you would have sand and she would start to push the cars again.

Q. You were getting sand out from the pipe?

A. Absolutely.

Q. You did not have any trouble with the sander at all that day?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. Who got down off the engine with a monkey wrench?

A. I did.

Q. What did you go down with a monkey wrench for?

A. To pound on the sand pipes.

Q. If an engine sander is working do you have to get down and pound on the pipes?

A. Well, we make sure that they were working right, that is all.

Q. You go down and pound on the pipes every time you try to work your sander from the top?

A. If we think it is not working we certainly do.

Q. That is why you go down?

A. Yes.

Q. What are you trying to do when you are hitting on the pipes?

A. So that the sand will run out of the pipes.

[fol. 21] Q. In other words, you are trying to loosen up the sand inside, are you not?

A. It loosens the pipes inside.

Q. That is what you are trying to do?

A. Yes.

Q. And that is what you tried to do on this day, is it not?

A. Yes, sir.

Q. And the reason you did that is because you had first tried to work it on top with your finger?

A. Yes, it was not working right.

Q. What was wrong with it?

A. Well, in the traps they get plugged up there a little and they get damp, and the sand don't run through very good.

Q. What happens beside the sand getting damp?

A. Well, it could be dirt of some kind getting in there.

Q. The sand is supposed to be dry, is it not?

A. Yes, but sometimes it is not always dry.

Q. Is it supposed to be dry?

A. Yes, sir.

Q. That sander is on there, am I right in this, so that when you push that button the sand will flow freely to the track below, is that right?

A. Yes, sir.

Q. And that sand is supposed to be dry so that it will flow freely, is it not?

A. Well, if it happens to rain or something you get out on the road then ——

Q. Is it supposed to be dry and kept in a dry compartment so it will not get wet?

A. Well, this sand box.

Q. Those boxes are there to keep it dry, is that right?

A. Yes.

By The Court:

Q. At what point were you when you got out and hit the sand box with a monkey wrench?

[fol. 22] A. That was when we were picking up these four cars at Hastings Fuel, before we coupled onto these other cars.

By Mr. Richter:

Q. That was only a few feet away, was it not?

A. Pardon me.

Q. That was only a few feet away from the switchpoint, was it not?

A. Well, along there about five car lengths.

Q. About five car lengths? You had been having trouble with the sander then, had you not?

A. No.

Q. Is it not a fact that only two of the pipes were allowing sand to escape from that engine?

Mr. Rhoads: I object, if Your Honor please. This is Mr. Richter's witness. Let him ask him questions.

The Court: I do not know what the situation is. Of course, you are leading him and cross-examining him. There may be a good reason for it, but it does not appear yet.

Mr. Rhoads: There has been no ground established for any cross-examination, but I have to interfere.

Mr. Richter: I would be glad to have Your Honor read the deposition and I think you will see whether there is ground or not.

Mr. Rhoads: What?

Mr. Richter: If Your Honor reads the deposition here you will have a better reason for understanding why I am cross-examining.

[fol. 23] Mr. Rhoads: Are you calling him as your witness?

Mr. Richter: We are bound to call him to prove our case.

The Court: You allege the negligence of this witness as one of the causes of the accident?

Mr. Richter: I do.

Mr. Rhoads: He does not.

The Court: He did in his opening address.

Mr. Rhoads: There is no allegation of defective trap.

The Court: Not specifically. He alleges negligence generally on the part of employees.

Mr. Richter: I plead the Act.

The Court: And then he points it up in his opening address. I think under the circumstances I will permit him to examine as he has.

By Mr. Richter:

Q. Is it or is it not a fact that when you were trying to work this air valve from the sander that you found that only two of these pipes were working and that the sand was clogged in the others?

A. There were two of them working and the two others weren't working so good.

Q. They weren't working in the way they were supposed to be working.

[fol. 24] A. That is in Hastings Fuel, but after we came out of there ——

Q. When you went down with this monkey wrench ——
Mr. Rhoads: Let him finish his answer.

By Mr. Richter:

Q. When you were hammering with this monkey wrench, the reason you hammered with the monkey wrench was because only two of the pipes were running sand, is that right?

A. They were running a little, but not freely.

Q. You were not getting enough sand to do your job right?

A. No.

Q. The grade at Hastings Fuel does not compare with the grade going up towards Hilltop does it—Red Top?

A. No, it goes downgrade into Hastings.

Q. The degree of grade is much smaller into Hastings Fuel than it is up to Red Top?

A. Yes, sir, there is more of a grade up to Red Top.

Q. When you did hammer with this monkey wrench on this pipe, what kind of sand was coming out, was it damp?

A. No, it wasn't damp. It was just a little—there wasn't enough sand coming down out of those two pipes.

Q. Had you found out what was wrong with it?

A. Yes, sir.

Q. What was wrong?

A. It was up in the trap where there was dirt or something got in where the sand was coming through.

Q. That dirt was blocking it from coming through?

Mr. Rhoads: Let him finish.

[fol. 25] By Mr. Richter:

Q. Go on, Mr. Ingoldsby, and tell us the whole story.

A. About the sand?

Q. Yes, what was wrong with that sander?

A. It was just a little dirt, a little like cinder got in there, a little like stone or something will plug this little part there that blows this sand down from the sand pipe through this trap.

Q. How do you know?

A. We always do this if our sand is not working.

Q. How did you know? Did you go up in the engine and take the sander apart?

A. I take the trap, there is a trap up there, and all we have to do is take a cap off, and take a little piece of wire, and push it into the sand box and loosen that up.

Q. And did you push a wire in on this occasion?

A. Absolutely.

Q. And if a sander is working right do you have to put a wire in there?

A. If it is not coming down through your pipes you do, yes.

The Court: I think I will recess at this point. Before you go, members of the jury, let me caution you now, not to discuss this case with anybody under any circumstances. Do not talk about it amongst yourselves really until you hear what the lawyers have to say to you and what the Court has to say to you, and all of the testimony, and do not let anybody talk to you about it. If anybody does talk to you or attempts to talk to you, please bring it to my attention right away, so that we will not have what we had last week, with a juror that did not quite understand. Do not allow anybody to discuss the case with you at all. If there is any attempt to talk to you about it tell me about it immediately.

(Recess at 12:25 to 2:00 o'clock P. M.)

[fol. 26] After Recess

W. J. Ingoldsby, recalled.

Direct examination (continued).

By Mr. Richter:

Q. Where was Mr. Nagle, your conductor, at the time of this accident?

A. He was comparing his manifest.

Q. Where was he located, where was he standing?

A. Well, he was up near Hastings Fuel coal tipple.

Mr. Rhoads: Mr. Ingoldsby, will you speak a little louder, please?

By Mr. Richter:

Q. About how many feet away from you was he?

A. Mr. Nagle?

Q. Mr. Nagle.

A. Oh, he was probably, 18, 20 car lengths.

Q. And he was at Hastings Fuel?

A. On Hastings Fuel, that is right.

Q. To the front of you and to the right of you?
A. To the right of us.
Q. Where was Mr. McGowan?
A. Mr. McGowan was riding the cars that we were pushing up to couple up to the other part of the train.
Q. He was on the front end of the first car farthest away from the engine, is that right?
A. That would be 22 cars from the engine.
[fol. 27] Q. He was the fellow who would give you the signal when to come and when to go back, is that right?
A. He rode the cars up there. He walked up there and got on those cars to couple up after Mr. Sunderlin had coupled on.
Q. He was up ahead of you?
A. Yes, sir.
Q. He was 22 cars away from you, was he not?
A. 22, yes, sir.
Q. Do I understand that you put a wire down into this sand trap?
A. Yes, sir,
Q. Did you put a wire down in that sand trap, is that right?
A. Yes, sure, opened up there so the sand would run free.
Q. Who was really running this engine, you or Mr. Sunderlin?
A. Mr. Sunderlin was running the engine.
The Court: Who is he?
Mr. Richter: He is really the fireman, is he not?
A. Yes, he was the fireman.

By the Court:

Q. Sunderlin was the fireman?
A. Yes, sir.

By Mr. Richter:

Q. You were the engineer but he was running the engine on this occasion?
A. At the time, yes, sir.
Q. Did you not state that it is the engineer who operates the sander?
[fol. 28] A. Yes, sir.
Q. But you were not the engineer on this occasion, were you?

A. Pardon me?

Q. You were not the engineer on this occasion, were you?

A. No, I wasn't, I was on the fireman's side.

Q. So it was Mr. Sunderlin who was really making these tests, was it not, it was not you at all?

Mr. Rhoads: I object.

The Witness: Sunderlin, yes, he opened the sand valve, sure.

By Mr. Richter:

Q. It was not you that opened it, then, was it?

A. I didn't get that.

By The Court:

Q. Was it you that opened it?

A. No, he opened the valve.

Q. Who put the wire in?

A. I put the wire in.

By Mr. Richter:

Q. You put the wire in it but he opened that up?

A. He opened the valve.

Q. You have a sand trap underneath the—a sort of a tarp where you have a screw that you screw it, don't you?

A. There is a trap there that we run a wire up, yes.

Q. Where is that sand trap?

A. Right up to the bottom of the sand box.

Q. That is on the cab of the engine?

A. No that is on the outside.

[fol. 29] Q. Is that trap right near the point where you lift off the top of the dome?

A. Yes, off the top of the sand pipe. It is about three or four inches from the bottom of the sand box.

Q. You open that trap up inside of the cabin of the engine?

A. No.

Q. You can open that inside the cab of the engine?

A. You just open a little air valve that blows air into the sand box to blow sand through the pipes.

Q. Have you a dome over top of that sand box?

A. What?

Q. A cover like that fits over the top of the sand box?

A. Yes.

Q. What is that for, to keep the sand dry?
A. Do you mean the cap on the sand box?
Q. Yes, that is to keep it dry?
A. Yes, sir.
Q. So that no water will get in there, is that right?
A. That is right.
Q. Do you know the engine house at Cresson where they bring these engines out of?
A. Yes, I do.
Q. They have an ash pit there? Do they have an ash pit at that engine pit or roundhouse?
A. I don't know how many crews they have there, they have a good many engines.
Q. They have an ash pit for each one?
A. No.
Q. How many ash pits have they got?
A. One ash pit to take the engines apart and clean them. Then they put them in the house for repairs if there are repairs on them.
Q. We are talking about the ordinary ash pit that you put them in to clean them before they go out on the road.
A. They have the one pit.
[fol. 30] Q. How far away from that ash pit do they store the sand?
A. Oh, it is not more than——
Q. Eight feet, ten feet, fifteen feet?
A. About that.
The Court: How far?
A. About eight or ten feet from the track where they sand them.
Q. About how high above the ground is that sand box where they store that sand?
A. Well, now, I just couldn't say. About ten or twelve feet.
Q. Ten, twelve, fifteen feet?
A. Twelve feet, fifteen feet.
Q. The box is open on top?
A. No, I don't think so. I never saw that. I don't know how it is.
Q. What do they do in that engine house after they get these ashes into the pit. Do they wet them?
A. Do they what?
Q. Wet them, put a hose on them, on the ashes.

A. They washed the boiler off, yes, they did. I don't know whether they do any more or not.

Q. What happens when the water hits those hot ashes at that point? Do you get any steam coming off there and rising up towards the sand box?

A. I wouldn't think so.

Q. Have you seen what happens?

A. I have never seen it, no. I have never noticed it.

Q. You do know they wet those hot ashes right there?

A. Yes, sir.

Q. That is only a few feet from where this sand stock is kept, is it not?

A. The sand box on top of the engine, yes.

[fol. 31] Q. It was Mr. Sunderlin then, who took the cap off, and it was you who put the wire down into the sand?

A. I took the cap off and put the wire in.

Q. Suppose you tell us how many feet of tube or pipe, whatever you want to call it, there is from the point where you have your lever that you push to make the sand go down, down to the point where the sand opens up at the bottom so that it can fall on the track?

A. Well, they have a small pipe—I don't know just what the length of the boiler is.

Q. Have you got about 16 to 18 feet of pipe?

A. From the boiler, yes. And then you have another pipe from the sand box down, that blows the sand into that.

By the Court:

Q. From the sand box down how many feet is it?

A. Well, I would say ten feet, anyhow.

By Mr. Richter:

Q. This pipe isn't just one length straight, is it? Doesn't it go in a line something like—let us see what you call that—like two L's, isn't that what happens?

A. No, it comes down right from the sand box.

Q. You push a lever or that air valve?

A. Yes.

Q. And then the sand comes down out of the place where it is kept, the receptacle in the engine?

A. Yes.

Q. What does it do, go straight down first?

A. Yes.

Q. And then does it go on the diagonal?
A. Yes, on the rail from there.
Q. It does not go straight down directly underneath?
A. It goes straight down and then goes around the wheel. The sand pipe comes in under the wheel.
[fol. 32] Q. You have four pipes altogether?
A. Yes, sir.
Q. Two to supply the back wheels and two to supply the front wheels, is that right?
A. Yes, sir.
Q. And this sanding apparatus is more or less in the middle of the engine, is it not, it is in the cab of the engine?
A. The sand blowers?
Q. Where is your apparatus?
A. It is in the cab of the engine.
Q. Therefore, it has to get from the middle of the engine to the two ends so that the sand will fall right near the wheels?
A. Yes.
Q. Is that correct?
A. I did not get that question right.
Q. Your apparatus that you push to put the sand on the tracks is located in the cab of the engine, is it not?
A. Yes, in the cab of the engine.
Q. It is about in the middle of the engine, is it not?
A. It is right against the boiler head of the engine and right near where the engineer sits.
Q. One of the outlets where it ends up is about 16 feet to the front?
A. Yes, sir.
Q. And the other is about 16 feet to the rear? Is it not?
A. Yes, I guess it would be.
Q. The sand has got to go down and it has to go lengthwise, does it not?
A. It is sloped.
Q. On a sort of a diagonal, like?
A. Yes.

The Court: I cannot hear you, nor can the jury. Talk to the jury. I would not put my hand up to my mouth.

[fol. 33] By Mr. Richter:

Q. The sand has to come down toward the ground and it has got to go out toward the two ends of the engine, does it not?

A. It comes right down straight around the driving wheel.

Q. And then it goes over the driving wheel?

A. Just right along to the rail.

Q. All four wheels are not right underneath the cab of the engine, are they. They are at different ends of the engine, are they not? Your front wheels and back wheels on that engine are different places.

A. You sand both back and front.

Q. The sand has to get from the sand receptacles to these two ends, does it not?

A. Yes, sir.

Q. There are pipes to get up to the two ends?

A. Yes, sir.

Q. One set of pipes comes down and goes toward the front and the other set of pipes comes down and goes to the rear, is that not right?

A. That is right.

Q. You cannot run a wire from the cab of the engine that will go all the way through the whole sander and come down to the ground, can you?

A. Well, you can, yes, you can run a wire down there if it is long enough.

Q. You did not have a wire that long that day?

A. No.

Q. You only had a short wire, did you not?

A. Yes, sir.

Q. About six or seven inches, eight inches?

A. (Witness indicates.)

Mr. Richter: Indicating about a foot, sir.

[fol. 34] By Mr. Richter:

Q. All you tried to pry loose is about that much inside the engine, is that right, about a foot? (Indicating.)

A. Which?

Q. With the wire.

A. Yes, up into the sand box.

Q. And that is the reason that it was necessary for Mr. Sunderlin, or was it you——

A. Mr. Sunderlin.
Q. —to go down with the wrench?

Mr. Rhoads: I object to that.
The Witness: No, I went down with the wrench.

By Mr. Richter:

Q. It was necessary for you to go down with the wrench and to go down to the ground, because no matter what you had done with the wire the sand did not run freely?

Mr. Rhoads: I object.
The Court: That is a long statement and I do not know whether the witness heard it all.
Mr. Rhoads: It is argumentative.
The Court: He is asking you this: was the reason you went down with the wrench and hit the pipe because you could not reach the stoppage with the wire?
The Witness: No, in the first place we went down to pound the sand pipe so the sand would run free, and if it wasn't running free, then I had to get up on the engine [fol. 35] with this wire to this trap, and open it up where it was clogged a little in this trap, with the wire, and then let that let the sand come down free to the track.

Q. Was it running all right when you were through with the wire?
A. Absolutely.

By Mr. Richter:

Q. Did you take any sand out of the top when you opened up the trap inside the cab?
A. No, I didn't.
Q. You sent it down, didn't you?
A. Yes.
Q. Was the sand wet or wasn't it wet?
A. We didn't go into the sand box, we went into the bottom of the sand box, put the wire up.
Q. You mean the trap?
A. Yes.
Q. In other words, you only opened up the bottom six inches, the part of the trap that is nearest to the track?
A. Yes, right from the trap.

Q. After you did that with the wire you still had to hit it with the wrench?

A. Then it was all right.

By the Court:

Q. Which did you do first?

A. I went down first and hit it with the wrench.

By Mr. Richter:

Q. So the only part then that you cleaned out was as far as you could go from the point where it hit the track, is that right?

[fol. 36] A. Yes, sir.

Q. Was it or was it not wet up inside the cab? Was or was not that sand wet up there?

A. In the cab?

Q. Yes.

A. I did not get your question.

By the Court:

Q. Was the sand wet up in the sand box?

A. No, it was not. It was just a little damp right at the trap, that is all.

By Mr. Richter:

Q. It was damp?

A. A little damp.

Q. So then that's it, when it gets damp does it help clog it?

A. What was the question?

Q. It clogs it when it is damp?

Mr. Rhoads: I will object to that.

By Mr. Richter:

Q. Does it clog it when it is wet that way?

A. Yes.

Mr. Rhoads: I object to that question, Your Honor.

The Court: What?

Mr. Rhoads: I object to that question, Your Honor.

The Court: Why?

[fol. 37] Mr. Rhoads: This is a witness on direct examination.

The Court: I know, but we have passed that.

Mr. Rhoads: Your Honor will grant me an exception to this question?

The Court: I think it is very clearly on the basis that he is a hostile witness.

Mr. Rhoads: I have not seen anything to show that he is hostile.

The Court: The fact that he is the man who is really charged with having caused the death of the plaintiff.

Mr. Rhoads: This man was not operating the engine.

The Court: I am only taking what I know from Mr. Richter's opening statement and he very particularly charged this witness with negligence that caused the plaintiff's death, so under those circumstances I would say he is automatically a hostile witness, not in the sense that he has any personal feeling, perhaps, but in the sense that he is being charged with having caused the death; therefore, I will permit cross-examination.

Mr. Rhoads: Your Honor will grant me an exception?

The Court: Yes, you do not need it, but I will grant it.

Mr. Rhoads: The entire line of cross-examining this witness.

The Court: Yes.

[fol. 38] Mr. Richter: Will you read the last question?

The Court: I realize fully he is a witness called by the plaintiff, but as the plaintiff states, apparently it is necessary that he be called.

By Mr. Richter:

Q. What kind of a day was it?
A. It was a nice, clear day.
Q. A clear, dry day, was it not?
A. Yes.
Q. There was no atmospheric dampness, was there?
A. No.
Q. If there was any dampness on that sand how did it get in there, do you know, Mr. Ingoldsby?
A. No, I don't.
Q. Was it damp when the sand was put there?
A. I don't know.

Q. Was there any leak in your engine from which it could have come?

A. No, there wasn't. The sand was dry on the top of the box.

Q. If there was any dampness in that sand you think it was in there when the sand was put in there?

A. No, there was just a little dampness around this cap, that it all.

Q. Where did the dampness come from?

A. I don't know, around steam, I guess.

Q. From what?

A. From steam from around the engine, maybe, I don't know.

Q. Do you mean the engine house or the engine itself?

A. It wasn't around the engine house. It may be along the road.

Q. Haven't you got some unions underneath that sand pipe? Do you now what a union is, a fitting?

[fol. 39] A. A union?

Q. Yes.

A. I don't understand.

Q. Do you know what a union is, a pipe fitting called a union?

A. Yes.

Q. You know what they are, you use a monkey wrench to open them up?

A. To tighten them up?

Q. Yes. Where are the unions on these sand pipes?

A. Unions?

Q. Do you have any unions on this sanding apparatus at all that connected the various parts of the pipe?

A. No, I don't know of any union.

Q. How do you couple these various sections of pipe?

A. It is just one pipe runs up the sand box from the track.

Q. Do you mean the whole sixteen feet is one pipe?

The Court: He says one pipe from the trap to the sand box.

By Mr. Richter:

Q. Just one pipe from the trap to the sand box, but are there any unions?

A. There might be separate pipes, I can't answer that question.

Q. Has it or has it not been your experience on occasions that you have to go down with a monkey wrench and tighten up everything because there is a leak in there, water getting in there?

Mr. Rhoads: I object.

By Mr. Richter:

Q. Has that or has that not been your experience?

[fol. 40] A. I don't remember seeing any sand pipe there that you had to tighten up the unions there.

Q. Take yourself now on to the point where you have got your cars coupled on the main track. You have pulled them off of Hastings Fuel.

A. Yes.

Q. Where was your engine located at that time before you started this pushing?

A. After we backed out of Hastings Fuel?

Q. Yes.

A. Well, we had four cars—we would be four cars below the switch, Hastings Fuel switch.

Q. You say you were four car lengths below the switch?

A. That would be about four car lengths and an engine.

Q. Would you think that perhaps your engine was right at the switch?

A. When we pushed off to couple the cars our engine was stopped about at the switch.

Q. After you coupled your cars to the other cars, wasn't your engine right at the switch itself?

A. Right at the switch.

Q. At that point the track is sort of level?

A. Yes, it is a little there where you start in.

Q. And your rise in your track does not begin until you get up quite a piece up the road, is that right?

A. You have a little grade up there, yes.

Q. That is where this little grade that we speak about up to Red Top really begins, that is maybe ten or fifteen car lengths away from the switch?

A. The other cars——

Q. Let me repeat the question.

A. Yes.

Q. Your actual grade from the switch on up toward Red Top begins about ten car lengths from the switch, does it not?

The Court: Is that about right?

[fol. 41] The Witness: It is more than that.

By Mr. Richter:

Q. How many car lengths?

A. You mean from Hastings Fuel switch?

Q. Yes.

A. We had 18 cars there that cleared Red Top siding and cleared Hastings Fuel siding.

By the Court:

Q. Where does the upgrade begin, how far from the switch?

A. It begins right at the switch.

The Court: I think there is a good deal he does not hear.

Mr. Richter: If Your Honor prefers, I would be glad to come close to him.

The Court: I know you are doing the best you can. He said before that it was some distance—

By the Court:

Q. The grade begins right at the switch?

A. About the switch, yes.

By Mr. Richter:

Q. Does the main grade begin at the switch? Or does the main grade begin some distance after the switch?

A. Just after the switch.

[fol. 42] Q. Is it the same level all the way up, or is it more of a level at one or another?

A. No, I think it is about the same all the way up.

Q. You are seated—were you seated at all at this time?

A. What?

Q. Were you seated in the engine at this time?

By the Court:

Q. Were you sitting down or standing up, what were you doing?

A. I was in the fireman's side, sitting down.

By Mr. Richter:

Q. Did you hear any conversation that took place between Mr. Eckenrode and Mr. Sunderlin who was seated in your regular seat?

A. No, only when he had passed the engine he just said —well, just like a joke, "If we can't push those cars up I will go back to the cabin and get a bar and bar them up"?

By the Court:

Q. Who said that?

A. Mr. Eckenrode.

By Mr. Richter:

Q. He made that remark?

A. Yes, just joking, that is all.

Q. That was at the time you were slipping?

A. Slipping a little bit.

Q. How many slips would you say the engine made after you had coupled your cars that you pulled out of this Hast- [fol. 43] ings Fuel siding onto the cars on the main track? Did you have as many as seven or eight?

A. From the time we started until we stopped?

Q. Yes.

A. That is pretty hard for me to say. I can't just remember that time.

Q. About how many?

A. Well, I wouldn't say more than three or four.

Q. Three or four?

A. Yes.

Q. How many years have you been operating an engine on this particular job?

A. Well, back for the last couple of years.

Q. Have you pushed engines—have you pushed cars in here many times?

A. Yes, often.

Q. Would you tell us whether on prior occasions the engine would slip, like it did on this one, when you were pushing about the same number of cars?

A. Well, lots of times it would.

Q. Were there times they wouldn't slip?

A. There were times they wouldn't slip.

Q. On the occasions on which you did slip did you have more or less cars than this time?

A. I have pushed more cars than we had this time up there.

Q. Was it on those occasions that the train slipped?

A. Was it what?

Q. Was it on those occasions that the train slipped, that the engine slipped?

A. Being——

Q. Having more cars.

A. Well, the heavier load, it would be more for the engine.

Q. Yes.

A. Sure it would make it slip there.

[fol. 44] Q. Suppose you tell us what windows you had in this engine. What windows do you have in this engine?

A. Well, we have two front windows and two on the side of the cab.

Q. How many do you have on the engineer's side in front?

A. One in front and one on the side.

Q. Suppose you tell us how big the front window is?

A. It is not more than about—it is about 12 or 15 inches high and about six inches wide. Just a little bit of a window.

Q. Just a little bit of a window?

A. It may be eight inches wide.

Q. What kind of a window have you got on your side?

A. Well, we have—I would say there are two windows there. They may be about fourteen by thirty, something like that.

Q. When you are working, in the time when this accident happened, is your side window open? I mean, is it open?

A. It is open, yes.

Q. When you are running your train at this point, where do you get your best view, out of this little window or out of this side window?

A. The front window was a better place to get a view, then you could see along the train from there without sitting down.

Q. What do you mean by "sitting down"?

A. Anybody looking straight out the window can see to the end of the cars.

Q. What do you mean "without sitting down"?
A. The other thing——

Mr. Rhoads: Let him answer.

Mr. Richter: He does not answer my question.

[fol. 45] The Court: He started. He says: Well, and another thing, which certainly was not going to be an answer to the question.

Mr. Rhoads: I think the witness should be permitted to answer the question.

The Court: If he is going to answer the question, but if he starts off and says something else——

I suppose what you had in mind was: without sitting down you could see better in the front window?

The Witness: Well, I will tell you the reason for that——

The Court: Yes.

The Witness: You stand up and if it would slip you shut the throttle off much quicker standing up than sitting down; the throttle is high on the boiler, and it takes some time to reach up there and shut it off if you have a wide open throttle on the thing.

By Mr. Richter:

Q. Sitting down can you look out of that front window?
A. No.
Q. If you are sitting down can you look out the side window?
A. Yes.
Q. Does a man run an engine sitting down? Or does he run it when he is standing up when he wants to see what is going on ahead of him?
A. I beg your pardon?
Q. When a man is running an engine forward does he run it standing up or does he run it sitting down?
[fol. 46] A. Sitting down.
Q. That is so he can get the benefit of the full view out of the side window?
A. Hang out of the window.
Q. That is the way he is supposed to run?
A. If you can see out of the front, well, it is just as well.
Q. You cannot see out of the front window without standing up?
A. It wouldn't be very nice standing up.

Q. If a man looks out of the side window can he see all the way to the end at that point where your engine was then standing?

A. Yes.

Q. Would he have any trouble seeing McGowan?

A. No.

Q. Would he have any trouble seeing anything on the slope alongside of the engine?

A. Not closeup to the engine, he couldn't see, because the running board and all would take his view from that right along the wheel.

Q. Didn't you tell us about that when you look out the side window you can see where the sand is falling on the track?

A. Not unless you hang out of the cab of the engine, out of the window.

Q. Extend out of the window?

The Court: Hanging out of the window.

By Mr. Richter:

Q. But if anybody stood alongside the running board on the ground, would you not see him, looking out the side window?

A. Not if he was close to the engine, if he came walking [fol. 47] alongside of the engine. Maybe two or three feet from the engine you could see him.

Q. Can you see anybody walking along Hastings Fuel looking out the side of the engine?

A. Yes, at Hastings Fuel, yes.

Q. When an engineer is about to begin his movement, where is he supposed to look?

A. Look ahead.

Q. And that is part of the regular practice, is it?

A. It is, yes.

Q. He cannot look around inside the cab of the engine, can he?

A. He can look out the window and look ahead.

Q. He has to do that instead of looking around inside the cab of the engine?

Q. When you are looking around inside of the cab——

The Court: What do you mean by "has to do that"? You are really asking this witness to tell us what in his

opinion is careful and what is not and that you cannot do.

Mr. Richter: All right, sir.

By Mr. Richter:

Q. How about making a movement without knowing where those other employees who are working ahead of you are located?

A. There was no movement made without getting a signal from our brakeman when we want to move these cars up, That was for McGowan.

Q. I understand that. Can you make your move without seeing McGowan then?

A. We saw McGowan. He was the man we were working with.

Q. Did you see McGowan?

[fol. 48] A. I didn't. Mr. Sunderlin did.

Q. Can the engineer make a move until he first sees the employee who is standing or located ahead of him and is intended to give him the signal?

A. He got the signal from McGowan to move the cars.

Q. Could he have properly made this move without first seeing McGowan and obtaining the signal from him?

A. I did not understand that question.

Q. You can't move this engine without an order to do so, can you?

A. No, sir.

Q. And that order is the signal that McGowan gives?

A. Yes, that is the signal.

Q. Could Sunderlin properly move this engine without first receiving that signal from McGowan?

A. No.

Q. Did you get out of the engine after this thing was all over?

A. Did I get off the engine?

Q. Yes, after the accident occurred did you get off the engine?

A. Yes.

Q. Did you look at the ground alongside of the engine to see what if anything the deceased had done there?

A. No, I just went right to him and picked him up; I didn't look around anything at that time.

Q. Did you see any marks on the engine itself to show the point of contact?

A. Well, according to his face and the cylinder head of the engine where the mark was where his head hit the cylinder head.

By the Court:

Q. There was a mark on the cylinder head?
A. Yes, sir.

[fol. 49] By Mr. Richter:

Q. How far ahead of the place where an engineer would sit was the cylinder head?
A. Well he was back I would say about five or six feet from the cylinder head.

The Court: He is talking about something else again.

By the Court:

Q. How far is the place where the engineer sits from the cylinder head?
A. Oh, from the cylinder head?
Q. Yes.
A. I don't know how many feet an engine is long. It is right at the back of the engine. I suppose it would be 40 or 50 feet anyway.

By Mr. Richter:

Q. From where the engineer sits to the cylinder head?
A. Where the engineer sits?
Q. Yes.
A. Well, that is the whole length of the engine. There are different size engines.
Q. That cylinder head is located toward the front of the engine, is it not?
A. Right at the front of the engine.
Q. If anyone were standing at the cylinder head on the ground, he would be to the front of the engineer, would he not, if the engineer was looking out of the side window, is that right?
A. He would be looking out the side window.
Q. I say, if he was looking out the side window a man [fol. 50] who was standing alongside of that cylinder head would be to the front of the engineer, would he not? Is that right?

A. Yes.

Q. If the engineer was standing up and looking out of the front window, he would still be to the front of him, would he not?

A. Yes, he couldn't see him, looking out the front window, though.

Q. He couldn't see him?

A. He would look right all over the running board. You look ahead. You have to look around the other window.

Q. If he was within a foot or two could he see him? If this was the cylinder head (indicating) and he was standing where I am standing, could or could not this engineer see the man standing there?

A. I guess he could there.

Q. Where on Mr. Eckenrode's body did you see the marks? On what part of his body?

A. Well, it was on his head, on his head where the mark was, the side of his face.

Q. The side of his face and on his head?

A. Yes, sir.

Q. How far from the engine was Mr. Eckenrode when you came down off the engine to find his body lying there?

A. It was about I will say five feet from the engine.

Q. Five feet from the engine?

A. Yes, sir.

Q. What part of the engine was it that the mark was on?

A. Well, it was on the right cylinder head.

Q. Was it on the cylinder head or on the driving——

A. On the cylinder head.

Q. What is the cylinder head connected to?

A. There is a casing around the cylinder head, it went up against that.

Q. That is where the mark was? Did you look at the driving—what do you call that?

[fol. 51] A. Do you mean your lap and lead lever?

Q. The kind that pulls the wheel?

A. The driving rods.

Q. The driving rods, yes. Did you look at the driving rod?

A. Did I look at them?

Q. Yes, after the accident happened.

A. I didn't look at them.

Q. That is all I am asking you. Did you notice where Mr. Eckenrode was standing at the time that he was talking to Sunderlin?

A. Yes, right across from the engine. I was sitting when he passed there.

Q. He was walking towards the front?

A. Yes, right on the Hastings branch siding past the engine.

By the Court:

Q. How far away from you?

A. I think it was maybe thirty feet, I guess.

By Mr. Richter:

Q. Just six feet away from the side of the engine?

The Court: He said maybe 30 feet.

Mr. Richter: I thought he said 30.

The Court: When he was talking to Sunderlin we are talk-about. How far from the engine was he?

The Witness: Mr. ——

[fol. 52] By the Court:

Q. Eckenrode.

A. After he was killed?

Q. No, when he was talking to Sunderlin.

A. I would say about 20 or 25 feet down.

Q. Down over the bank?

A. Yes, on the Hastings Fuel siding.

By Mr. Richter:

Q. Was it after the conversation was had between Mr. Sunderlin and the deceased when this accident happened?

A. Pardon me?

Q. It was after this conversation between Sunderlin and Eckenrode when this accident happened, was it not?

A. Afterwards?

Q. Yes.

A. Sure.

Q. That is right, is it not?

A. Yes.

Q. Did you see where Eckenrode went after that?

A. No, I didn't.

Q. You did not?

A. No.

Q. As you made each one of these slips, when you tried to get the train going, about how far do you think the train went before she would stall again, and would not catch the track. About how many feet do you think you moved?

A. Oh, went about a couple of feet.

Mr. Richter: Will Your Honor bear with me a minute, please?

The Court: I will recess for ten minutes.

(Recess at 2:40 P. M.)

[fol. 53] The Court: Proceed.

By Mr. Richter:

Q. Just before the accident occurred did you see what it was that Mr. Sunderlin did to start the engine, the last move?

A. I didn't get your question.

By the Court:

Q. The last move before the accident, did you see what Sunderlin did to start the engine?

A. The last move, yes, the last move——

Mr. Richter: Yes.

Q. Before the accident?

A. No, I don't remember what he did.

By Mr. Richter:

Q. Did the engine stop suddenly then?

A. Oh, no, it didn't stop. It would just slip and keep moving.

Q. What was the first thing that you knew about that brought to your attention that this accident had happened?

A. Well, he happened to look out the window and he saw Mr. Eckenrode, and he just gave a toot of the whistle that he would stop.

Q. You did not see Mr. Eckenrode until you got out of the engine, did you?

A. No.

Q. You don't know what he saw?

A. No.

[fol. 54] Mr. Richter: I will move to strike that out, if your Honor please.

The Court: All right.

By Mr. Richter:

Q. The first thing you knew was when Mr. Sunderlin pulled the——

A. Whistle. He said that something had happened to Mr. Eckenrode and he ran off and jumped off the engine and he ran to him and then I got down to him.

Mr. Richter: That is all.

Cross-examination.

By Mr. Rhoads:

Q. Mr. Ingoldsby, you are retired at the present time?

A. Yes, sir.

Q. You were engineman on this train. What was its number, 603?

A. 603, that is right.

Q. What time had you taken that engine from the engine house at Cresson?

A. 6.35 we were ordered for.

Q. In the morning?

A. Yes.

Q. This accident happened, I think you said, about 12.10 or about ten minutes past noon?

A. 12:10, that is right.

Q. It was a clear, dry day?

A. That is right.

The Court: 6:35, did you say?

[fol. 55] Mr. Rhoads: 6:35 A. M.

By Mr. Rhoads:

Q. You were asked about the location there. There is a siding track which goes off to the Hastings mine, is there not?

A. That is right.

Q. And that track is known as Hastings Fuel track No. 1?

A. That is right.

Q. And then the main track goes upgrade to Red Top?

A. That is right.
Q. There were two engines?
A. Yes.
Q. Your engine was number 603?
A. 603.
Q. And that was the pusher engine?
A. That was the pusher engine.
Q. And the other engine was up at Red Top?
A. Red Top.
Q. That is at the top of the grade at another switch?
A. Yes, that is right.

Mr. Rhoads: May I have these marked for identification?

(Photograph entitled "26478, Hastings, Pa., 10-14-43, looking north from a point on the main track about at the frog of the Hastings Fuel Company mine siding" was marked Defendant's Exhibit 1 for identification.)

(Photograph entitled "26475, Hastings, Pa., 10-14-43, looking south from a point on the east bank of the main track with camera about 375 feet north of point of switch, [fol. 56] Hastings Fuel Co. siding switch" was marked Defendant's Exhibit 2 for identification.)

(Photograph entitled "26477, Hastings, Pa., 10-14-43, looking north from a point on main track just south of Hastings Fuel Co. siding switch," was marked Defendant's Exhibit 3 for identification.)

By Mr. Rhoads:

Q. I show you a picture which has been marked for identification Defendant's Exhibit 1, and ask you if that is a picture of the Hastings Fuel number 1 track and the main track.
A. That is right.

The Court: Let me see it.

(Mr. Rhoads hands picture to the Court.)

By Mr. Rhoads:

Q. Looking at that, as you face it, Hastings Fuel track is the one to the right hand side of the picture?
A. That is right.
Q. And the main track, the one going uphill, is the one to the left-hand side of the picture?

A. Yes, sir.
Q. And right here in the foreground is the switchpoint?
A. Yes, that is the frog.
Q. That is the frog?
A. Yes.

Mr. Rhoads: May I show those to the jury, Your Honor?

[fol. 57] The Court: Yes.

(Mr. Rhoads shows photographs to the jury.)

Mr. Rhoads: If you want to pass those around.
The Court: That is all right. You can go ahead while they are looking at it.
Mr. Rhoads: I am going to show him this one.
Mr. Richter: Show them all.
Mr. Rhoads: I will.

By Mr. Rhoads:

Q. Now I show you another picture which has been marked for identification as Defendant's Exhibit 3, and ask you if that is a picture of the same two tracks looking the same direction.
A. Yes.
Q. And that is taken from where?
A. Right from the point of the switch.
Q. From the point of the switch?
The Court: It is a little further back than the other one.
Mr. Rhoads: A little further back, yes, from the point of the switch instead of the frog.
The Court: All right, show that to the jury.

(The picture was handed to the jury.)

[fol. 58] By Mr. Rhoads:

Q. I show you a picture which has been marked for identification Defendant's Exhibit 2, and ask you if that shows the Hastings Fuel track.
A. Yes.
Q. This is looking in the other direction, is it not?
A. Looking in the other direction.
Q. So that the Hastings Fuel track is to the left-hand side of this picture as you face it?

A. Yes, sir.

Q. And the main track is up here to the right (indicating)?

A. Yes, sir.

Q. And this shows the embankment?

A. Yes.

Q. How far from the main track is the Hastings Fuel track at the point where this accident occurred?

A. No, it occurred here, about (indicating). I would say it is about seven or eight feet.

The Court: How far did he say?

Mr. Rhoads: About seven or eight feet.

The Witness: About seven or eight feet.

By Mr. Rhoads:

Q. How high is the embankment?

A. I would say about two or three feet, about three feet, I imagine.

Mr. Richter: I did not get that, Your Honor.

Mr. Rhoads: About three feet.

[fol. 59] Mr. Richter: What was the seven or eight feet?

Mr. Rhoads: That the Hastings Fuel track was away from the main track.

By Mr. Rhoads:

Q. I believe you testified that that grade, that upgrade on the main track, starts on the Cresson side of that switch.

A. Of the Hastings Fuel switch?

Q. Yes.

A. You say is there an upgrade there?

By the Court:

Q. Where does it start, the upgrade?

A. Right about the frog, right when you get to the frog.

By Mr. Rhoads:

Q. The upgrade starts right about the frog?

A. Yes, sir.

Q. That is quite an upgrade on the main track there?

A. Yes.

Q. And the Hastings Fuel track is kind of a downgrade?

A. Down into a dip from the switch.

Q. From the switch it goes down?
A. Yes, sir.
Q. While your main track from the frog goes up?
A. Yes.
Q. You testified I think that you were the engineman on this 603.
A. Yes.
Q. Who was the fireman?
A. Mr. Sunderlin.
Q. And Eckenrode was the rear brakeman or flagman?
[fol. 60] A. He was the flagman, the rear brakeman they call it.
Q. And McGowan was the middle brakeman?
A. Yes.
The Court: He said all this.
Mr. Rhoads: Your Honor, I want to bring it out a little more clearly.
The Court: It is perfectly clear.
You have not asked him a question that he has not put clearly and definitely on direct examination. Start something new.

By Mr. Rhoads:

Q. And Patterson was the fron brakeman?
A. Patterson, yes.
Q. Were you operating the engine at the time of this accident?
A. No, I wasn't.
Q. Who was?
A. Mr. Sunderlin.
Q. Will you describe this movement from the beginning? You had put how many cars on the main track?
A. We left 18 cars on the main track.
Q. And those were loaded coal cars, loaded hopper cars?
A. Yes.
Q. Then you went into the Hastings Fuel Track?
A. Yes.
Q. And you got four more cars?
A. We had four cars coming out of Hastings Fuel, yes, which made 22 cars.
Q. And you pulled those out onto the main track?
A. Yes, sir.
Q. And pushed them up against the 18?

[fol. 61] A. Yes, sir.

Q. Who coupled?

A. Mr. Eckenrode.

Q. Who threw the switch?

A. Mr. Eckenrode threw the switch.

Q. When you were on the Hastings Fuel track did you look at the sanders?

A. Yes, I did.

Q. Why did you do that?

A. Well, I knew that we would have a heavy drag to push up there and I wanted to see that the sanders were all working.

Q. Were they working?

A. They were working, but two of them weren't working good, the ones I opened up.

Q. And you opened up the traps?

A. Yes, sir.

Q. Then I understand you to say you put a wire in the trap?

A. Put a wire and pushed it up in there, yes.

Q. And cleaned it out?

A. Yes.

Q. And closed the traps up again?

A. Yes.

Q. How were they working then?

A. They worked O. K.

Q. All four pipes?

A. Yes.

Q. And there are only four pipes on this type engine?

A. Yes.

Q. They were O. K. when you were on the Hastings Fuel?

A. O. K.

Q. Then you backed up onto the main track?

A. Yes.

Q. Did you look at the sanders again before the movement started?

[fol. 62] A. Yes, I was down on the ground and looked at them myself, when he was pushing up, coupling up.

Q. How were they working then?

A. O. K.

Q. All four pipes?

A. All four pipes.

Q. Then you coupled up and started this movement?

A. Yes.

Q. After Eckenrode threw the switch, he threw the switch before the movement was started, did he not?

A. Yes.

Q. Did you see where Eckenrode went?

A. He went up.

The Court: Wait, let him answer whether he saw him.

Mr. Richter: I object to this and ask that that answer be stricken. Let him ask whether he saw him at all.

By the Court:

Q. After you got on the main track did you see Eckenrode?

A. Oh, yes, after we got out on the main track.

Q. What did you see him do or where did you see him go?

A. He threw the switch and rode the cars up, coupled onto the other 18 cars.

Q. You saw that, did you?

A. Yes.

By Mr. Rhoads:

Q. Then after he coupled did you see him again?

A. No, I got on the engine and he walked back then to the cabin.

[fol. 63] Q. Which side did you get on?

A. I got on the right side of the engine.

Q. You got on the right?

A. Yes.

Q. Which cab did you go into?

A. Into the cab of the engine.

Q. On which side?

A. On the right side?

Q. Did you see Eckenrode again?

A. No, I didn't see him—well, yes, I did, he passed the engine when we came up, when we were trying to push those cars up and he talked about barring the cars up, that is all. I saw him between the engine and tender when he hollered to Mr. Sunderlin he was going to get a bar and push the cars then.

Q. When you saw him then he was walking down the Hastings Fuel track?

A. Yes, sir.

Mr. Richter: I object to that.

Mr. Rhoads: That is where he said he was.

The Court: The witness knows that.

By Mr. Rhoads:

Q. When you last saw Eckenrode, that was when he spoke to Sunderlin?

A. Yes.

Q. And he passed, you saw him, through the place between the end of the engine and the tender?

A. Yes.

Q. Where was he walking?

A. Well, he was walking on the Hastings Fuel siding.

Q. That was how many feet down below the main track? [fol. 64] A. Well, I would say where he was it was maybe ten feet.

Q. Were you moving at that time?

A. Well, yes, we were moving, the cars were moving.

Q. How long a movement did you have to make to couple up these 22 cars to the other cars that were up above on the main track?

A. How long?

Q. How far?

A. Oh; I will say it was about between four and five car lengths from the time we started to couple on——

By the Court:

Q. When you saw Eckenrode on the Hastings Fuel siding down there, and you looked down, which direction was he walking then?

A. He was walking to the front part of the train, the east.

By Mr. Rhoads:

Q. He was walking in the same direction the train was going, was he not?

A. Yes.

Q. He was down on the Hastings Fuel track and you were up on the main track?

A. Yes.

Q. I think you said that you heard Sunderlin toot the whistle for a stop?

A. Yes.

Q. And after you got out how far had your engine moved, how much further did you have to go?

A. We only had to go about a car length, I think that is all it was, about a car length.

Q. So that this movement had taken you from the switch [fol. 65] and you had completed four to five car lengths of your move, and you had about a car length still left to go?

A. Yes.

Q. After this accident did you look at the sand?

A. Look at the sand?

Q. Yes.

A. Not if the sand was working, I didn't look at it for that, because the sand was working O.K.

Q. Did you see whether it was working or not after the accident?

A. Yes, I seen whether it was working, yes.

Q. Did you see any sand on the rails?

A. Oh, yes.

Q. How far back did that sand go?

A. From where we started to push this train.

Q. To where?

A. Up to where we had stopped at the accident.

Q. So that the sand was from where you had started the movement back of the frog or beyond the switch up to where you stopped at?

A. Up to where we stopped at.

Mr. Rhoads: Will your Honor indulge me just a moment?

The Court: Yes.

By Mr. Rhoads:

Q. You were asked by Mr. Richter about sand in the cab. There is no sand in the cab, is there?

A. No, there is no sand in the cab.

Q. In the cab, as a matter of fact, there is just this valve or button that you push?

A. A valve.

Q. And that releases the air?

[fol. 66] A. That puts the air to the sand and blows the sand down.

Q. Where is the sand box?

A. It is out on the—I will say it is almost the front end of the engine.

By the Court:

Q. Where is the trap that you talk about?
A. It comes down to where the sand pipes come from the sand, the trap.
Q. Is that near the front of the engine?
A. Yes, that is near the front of the engine.

Mr. Rhoads: May I ask that that be marked for identification.

(A picture entitled "27532, Pitcairn, Pa., 4-2-46, engine 3483, type L-1s, stoker fired, right side and front end" was marked Defendant's Exhibit 4 for identification.)

Mr. Rhoads: Will you mark this too for identification, and this?

(A photograph entitled "27533, Pitcairn, Pa., 4-2-46, engine 3483, showing right side cylinder and position of lap and lead lever, with piston guide at rear of guide box" was marked Defendant's Exhibit 5, for identification.)

(A picture entitled "27534, Pitcairn, Pa., 4-2-46, engine 3483, showing right side cylinder and position of lap and lead lever, with piston guide at front of guide box, limit of travel forward" was marked Defendant's Exhibit 6, for identification.)

[fol. 67] By the Court:

Q. These three that are marked, these three pictures are the pictures of your engine, Exhibits 4, 5 and 6?

Mr. Rhoads: If Your Honor please, they are not of this 603, they are the same type of engine.

By the Court:

Q. That is the same type of engine as yours?
A. Yes, that is it.

The Court: All right, ask him about it.
Mr. Rhoads: May I show them to Mr. Richter? He has not seen them.
Mr. Richter: Shall I come up there, Your Honor?
The Court: Yes, sure.

By the Court:

Q. Where is the sand box?
A. There (indicating).

By Mr. Rhoads:

Q. Looking at Defendant's Exhibit 4, will you take a pencil——

The Court: I will make it.

[fol. 68] By Mr. Rhoads:

Q. On this one will you point out where the sand box is?
A. (Indicating.) Right there.

The Court: I will mark it.
Mr. Rhoads: This is the sand box (indicating).
The Court: Yes, all right.

By Mr. Rhoads:

Q. Now, will you point to the trap?

By the Court:

Q. Where are the traps?
A. The trap is right in there (indicating), it comes right in there.
Q. Can you see it on the outside? Is it on the outside?
A. Yes, there it is (indicating).
Q. Those things?
A. Yes.
Q. There are two traps?
A. Yes, one on each side there.

By Mr. Rhoads:

Q. Will you mark the sand traps on that picture, which is Defendant's Exhibit 5?

The Court: I will mark it. There — two, is that right (indicating)?

A. That is right.
[fol. 69] Q. Right there?
A. That is right.

Mr. Rhoads: Will you mark the one on the other side?
The Court: Well, I marked "traps" there.

By Mr. Rhoads:

Q. While we have these pictures, you were asked about the marks on the engine. Will you show where the marks were on any one of those pictures?

A. The mark was right in here (indicating) between this lever and this cylinder head (indicating), that is where it was.

By the Court:

Q. What was it?

A. This lever, what you call the lap and lead lever (indicating).

Q. Was it there?

A. Yes, it comes up in this cylinder, almost about two inches.

Q. Give me the point exactly, where was the mark?

A. Right on the bottom of this cylinder head and the end of this lap and lead lever (indicating).

Q. There (indicating) and there (indicating)?

A. Yes, about there.

By Mr. Rhoads:

Q. The marks are on the bottom of the cylinder head and the bottom of the what?

A. Lap and lead.

[fol. 70] Q. The lap and lead lever?

A. Yes.

The Court: I will show it to the jury. That is all you want to know?

(To the Jury.) I have marked this. There is the sand box I have marked, and the trap, and here is another picture showing the sand box on this picture (indicating). He has also pointed out the place where the marks were, the ones right there (indicating) and the ones there.

The other picture is marked but it is the same thing.

Proceed.

By Mr. Rhoads:

Q. There is also a slight curve there, is there not?

A. Yes.

Q. On the main track?

A. Yes, just a little, a slight curve.

Q. I think you testified that it was not unusual for your engine to slip, pushing a heavy drag such as this up that grade?

A. No, just on that grade there.

Mr. Rhoads: That is all.

Redirect examination.

By Mr. Richter:

Q. You had two engines, did you not, there? You actually had two engines on this job, did you not?

A. Yes, we had two engines on the train.

Q. Why did you not use two engines to pull it up that track if it was such an unusual move, so heavy, and always slipping?

[fol. 71] Mr. Rhoads: I object to that. There is nothing about an unusual move.

The Court: He did not say it was an unusual move. He said sometimes it slipped and sometimes it did not. Do not misquote what was said.

Mr. Richter: I will rephrase it.

By Mr. Richter:

Q. If it was so hard to pull these 22 cars up this track, why were you not using two engines to push these 22 cars up?

A. We only had one engine back there. The other engine was doing work.

Q. You could have brought the other one back too, could you?

A. Not very handy to do our work.

Q. Could you have hooked it onto the front end of those cars and help pull it up, one pulling and one pushing?

A. We had to push these cars up against and towards the cars that he hauled, brought down there.

Q. Could you have pulled these 18 cars down the main track and coupled them onto the four when they were lying in the Hastings Fuel siding?

A. Coupled the 18?

Q. Yes, and pulled all 22 out and then had your 18 on the front end?

Mr. Rhoads: I object to that.

The Court: He is asking whether it could have been done. I think it is all right. I suppose so.

[fol. 72] By the Court:

Q. Is that right? All he wants to know is whether it was possible.

A. No, we couldn't do that. We had our other engine blocked in there. We couldn't do that.

The Court: He said he could not do that. He had the other engine blocked up there.

By Mr. Richter:

Q. As a matter of fact, you did not get out of the engine to make just a routine test of the sanders, did you?

A. On the Hastings Fuel branch?

Q. Yes.

A. I absolutely did.

Q. You got out all right, but it was not to make a test like you would every single day, was it? It was because you had trouble with the thing and it would not work?

A. No, I had no trouble.

Q. You knew that the sanders were not all blowing?

A. I was going to see that the sander was working good with the track we had to push up?

Q. And you knew before you got out of the engine that only two of the pipes were flowing right.

A. Before I got out of the engine?

Q. Yes.

A. I didn't know that until I got down on the ground.

Q. You were asked a question when you were first interrogated about this case, and you were asked: "You weren't making a test—you were opening it up?"

Mr. Rhoads: What page?

Mr. Richter: 42.

[fol. 73] The Witness: Yes.

Mr. Richter: And your answer was "yes." Didn't you say that? (Indicating). That was your answer, was it not?

The Witness: About this test, that was an air test on the cars that we were coupling onto, that I would make it, that is when I was looking at the sand while I was coupling onto those cars and making this test.

By Mr. Richter:

Q. You were asked this question ahead of it: "When you pushed the wire up into the clogs, that was to open it up?"
And your answer was: "To open it up in the sand box."
And the very next question was: "You weren't making a test—you were opening it up?"
And your answer was: "Yes."

Mr. Rhoads: Read the rest.
Mr. Richter: I will go on with the whole thing. I want to se if that is his answer up to that point.

By Mr. Richter:

Q. (Continuing:) Is that correct?
A. Of course, opening up, that is opening the sand up then.
Q. You were doing it, not because of any test, according to that? You were doing it because the thing was clogged and you knew it, isn't that what your answer was?

Mr. Rhoads: Will you read the rest?
[fol. 74] Mr. Richter: I will read it all in a moment.
Mr. Rhoads: Do not take a part of it.
Mr. Richter: May I go on with my examination, Your Honor.
The Court: I want to be sure if you are talking about the same thing, if he knows what you are talking about.
Mr. Richter: Suppose I show Your Honor this deposition and you can see what is involved here.

(Side bar conference off the record.)

The Court: That is what he said.
Mr. Rhoads: It is exactly what he testified to. It is not a bit different.

By Mr. Richter:

Q. You were not making a test then, were you, but you were opening it up because it was clogged?
A. Opening it up so it would be running freely.

Q. Because, as the rest of this answer was, you said: "You see, that makes it work. Sometimes you get a little stone in there and sometimes a little cinder, or something will go in that pipe there that clogs the sand there, and you have to open it up."

And the next question is: "Ordinarily, if the pipe is working right, you can sit in the engine?"

And the answer: "If it is working right. It has a valve and it works by air."

Question: "And that is in the cab of the engine that you do that?"

[fol. 75] And your answer was: "Yes," was it not?

A. It was working right, yes.

Q. Yes, sure, so that the only time you really go out of the engine at all is if it is not working right in the engine, is that not true? What is your answer?

A. What was that question?

Q. The only time you go out of the engine?

A. Yes, when it is not working.

Q. When it is not working, right.

When you saw Mr. Eckenrode walk past the engine the very last time were you seated or were you standing?

A. I was seated on the box.

Q. You were on the left-hand side of the engine.

A. I was on the left-hand side of the engine.

Q. And from the position where you were you were able to see the decreased walking alongside the engine, were you not?

A. Yes, on the Hastings Fuel track.

Q. And that was to the right of the engine?

You could see Mr. Eckenrode walking past the engine to the right of the engine, could you not?

A. Yes, sir.

Q. From a seated position inside of the engine?

A. Yes.

Q. But even closer to Mr. Eckenrode was the fellow who was really running the engine, was he not?

A. Well——

Q. That is, Sunderline was right over on the right side?

A. He was on the right-hand side.

Q. And all he had to do was cast his eyes out of the window and he could see Eckenrode, could he not?

A. Oh, yes.

Q. It was Mr. Eckenrode's duty, was it not, as rear brakeman, to make the coupling between the engine and the first car?

A. Mr. Eckenrode?

[fol. 76] Q. Yes.

A. Would you ask that again?

Q. It was his duty, was it not, as rear brakeman, to make that coupling?

A. Yes, it was.

Q. He made a proper coupling, did he not?

A. Yes.

Q. It was his duty to throw the switch, was it not?

A. Yes.

Mr. Richter: That is all.

Recross-examination.

By Mr. Rhoads:

Q. After he made that coupling did he have any other duties in connection with this movement?

A. No, he went right back to the cab.

Q. He had no other duties there in connection with that move?

A. No, he had no other duties.

Mr. Rhoads: That is all.

Mr. Richter: Wait a minute.

By Mr. Richter:

Q. Excepting that all of your trainmen——

The Court: Gentlemen, this witness has been examined and cross-examined.

[fol. 77] Mr. Richter: All right, sir, I will not ask the last question.

Thank you.

Mr. Rhoads: That is all, Mr. Ingoldsby.

Mr. Richter: Mr. McGowan, please.

JOSEPH B. McGOWAN, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Richter:

Q. Mr. McGowan, by whom are you employed?
A. The Pennsylvania Railroad.
Q. In what capacity, sir?
A. At the present time I am a freight conductor.
Q. At the time of the accident on October 8 or 7, 1943, you were brakeman, were you not?
A. Middle brakeman, yes.
Q. Were you the head brakeman or the middle brakeman on this particular shifting movement involved in this accident?
A. Middle brakeman.
Q. Are you the man who rode the front end of these cars as they were being pushed up toward Red Top?
A. I am.
Q. As such, what position did you take on those cars?
A. I took the front end of the right-hand side of the car heading west.
[fol. 78] Q. You took a conspicuous position, I take it?
A. I had a foot in the stirrup and a hold on the grab iron on the side of the car.
Q. You had to see what was ahead and make signals back toward the engine, is that right?
A. Yes, sir.

By the Court:

Q. Which car was it?
A. The 22nd car from the engine.
Q. The one way up?
A. That would be the west car from the engine.

By Mr. Richter:

Q. And that was the lead car, was it not?
A. That was the lead car.
Q. As such, what was the move intended, Mr. McGowan?
A. To push 22 cars against 29 cars, making a total of 51.

Q. About how far would you say you had to go once the first group of cars were pushed on down at the switch, from Hastings Fuel?

A. I don't understand?

Q. After the cars had been coupled, how far did that whole group of cars have to be pushed until they met the other groups of cars further up the track?

A. From five to six car lengths.

Q. Did you receive notice, or some indication or signal to show that the coupling had been made down below first?

A. No, I knew it was made.

Q. How did you know?

A. I saw it myself.

Q. Were you down there then?

A. Almost.

Q. How close to it were you?

[fol. 79] A. At the time it was made I was about—I was about the middle. I was about eleven cars each way.

By the Court:

Q. That was coupling the four to the eighteen?

A. That was coupling four to eighteen.

By Mr. Richter:

Q. Do you know who made that coupling?

A. I do.

Q. Who made it?

A. J. H. Eckenrode.

Q. Then you walked to the end and took the position you just described to us, did you not?

A. I walked up to the west end of those 22 cars.

Q. Now, at that time when you took that position, did you give a signal for the train to be pushed ahead?

A. When we were ready to make the movement.

Q. As you were looking, which way were you looking?

A. I was waiting for the other engine to clear and get in, that is the 342 engine, made sure everything was all right, looked back towards the rear end, made sure that was all right, and gave the 603 engine a signal to proceed west.

Q. When you say you gave that signal, you are talking now about the engine down at the end that Mr. Sunderlin was running?

A. That is . ht, the 603 engine.

Q. Did you look towards that engine at that time?

A. I did.

Q. When you looked down there you gave the signal to proceed west, did you not?

A. That is right.

Q. Did you continue to look in that direction?

A. Not at all times.

[fol. 80] Q. Did the train start moving ahead steadily, or did something happen?

A. When I gave the signal he answered my signal with two shorts blasts of the whistle.

Q. What does that mean?

A. That means proceed.

Q. All right.

A. And he started pushing forward.

Q. And what was happening?

A. The engine started slipping.

Q. How did you know it was slipping?

A. I heard it, saw it.

Q. What did you hear and what did you see?

A. Well, I heard it slip, the engine just spins, makes a noise.

Q. What did you see?

A. Smoke coming from the stack in rapid exhaust.

Q. Is that an indication that the engine is slipping and not taking hold?

A. On a grade like that, the movement we were making it was, yes.

Q. Where was the engine located in relation to the switch at Hastings Fuel?

A. When we started I would say approximately down at the switch points.

Q. How is the ground at that point in relation to the Hastings Fuel? Is there a hill or is it more or less level?

A. It is hill all the way.

Q. I mean as between the Hastings Fuel track and the main track, are they about level there or one up and one down?

A. I don't get you.

Q. Is there any difference in gradation between the Hastings Fuel level and the main track?

The Court: We have had that at least five times. What [fol. 81] is the use of asking the witness a question that shows up in a picture anyhow?

By Mr. Richter:

Q. How many times would you say this thing slipped, Mr. McGowan, after you had given your first proceed signal?

A. I could not say.

Q. Did you see Mr. Eckenrode after that?

A. After that?

Q. Yes. When she started to slip, before the accident?

A. Before the accident I saw Mr. Eckenrode, yes.

Q. Was he to the west of the place where Sunderlin was sitting or to the east of it?

A. When I first saw him he was east of him.

Q. Then what did you see him do?

A. I saw him walk from the cabin up to the engine.

Q. About how close was he to Sunderlin then?

A. Well, he was down some place between 12 and 16 feet away from him.

Q. To Sunderlin's right?

A. To Sunderlin's right.

Q. Can you tell whether he was attempting to speak to him, or was he looking up there to him?

A. I figured that he was, I judge they were talking.

Q. Where was Mr. Sunderlin's head at that time, inside the engine or out?

A. It was going in and out. When the engine slipped it was in.

Q. All this time, Mr. Eckenrode was just down below?

A. He wasn't there very long.

Q. Then which way did Mr. Eckenrode walk?

A. Came right on up to Hastings Fuel siding.

Q. In the direction toward you?

A. West, that is right.

Q. What did you see Mr. Eckenrode do then?

[fol. 82] A. I saw him walk along a little and stoop down and pick up something.

By the Court:

Q. Was he walking the same way the train was going?

A. Yes.

By Mr. Richter:

Q. You saw him bend down and you saw him pick up something. Rise, please, so the jury can see, and show what position you saw his hands in.

A. (Witness indicates.) He walked down, he kept on going.

Q. When you saw him pick something up, what position were his hands in when he rose?

A. That is the position I am showing you. He picked them up and kept on going.

Q. Did he keep his hands like that (indicating)?

A. He walked along with them in front of him like that (indicating).

Q. They were not down by his side but up this way (indicating)?

A. This way (indicating).

By the Court:

Q. Were his hands closed?

A. I couldn't tell. I was too far away.

By Mr. Richter:

Q. Then what happened?

A. Well, he bore to the left slightly and went out of my sight.

[fol. 83] Q. When you say towards the left, that is towards the engine?

A. Towards the train.

Q. Towards the train?

A Yes.

Q. Then he suddenly went out of your sight?

A. Yes, sir.

Q. Afterwards you looked at the ground where he had bent down, did y u not?

A. I looked at the ground where the engine was stopped.

Q. Where the engine was what?

A. Stopped.

Q. What did you see in the way of marks about the points where the deceased had bent over?

A. Two marks in the cinders, and there was cinder marks back there, it could have been made by a man's hand or a man's foot. I would judge it would be 16 to 18 inches long, one slightly back of the other.

By the Court:

Q. Is that where he stooped?

A. No, that is—where he stopped, that is where he stooped down to pick up whatever he got.

Q. How far from the place where he stooped was it?

A. It would be just about the length of the engine, I guess, 35, 40 feet, something like that. I would judge it would be about that far, I don't know for sure, I couldn't say.

By Mr. Richter:

Q. Mr. McGowan, you remember testifying in this case, do you not, sir, in my office?

A. Yes, sir.

Q. You remember that?

[fol. 84] A. Yes.

Q. You were under oath at that time?

A. Yes, sir.

Mr. Richter: Page 24, Mr. Rhoads.

By Mr. Richter:

Q. You were asked this question: "What did he do?"

You answered: "He walked right up to Hastings Fuel and stepped down and picked up something, and then started up the bank."

Then you were asked: "Could you see what it was he picked up?"

And your answer was: "No, but I saw what he had; what he had picked up. I saw what I judged to be the prints of his fingers afterwards."

The next question: "What was it?"

Your answer: "Wet sand."

Question: Wet sand?"

Your answer: "Yes."

Question: "That is, the prints of his fingers where he dug into the ground?"

And your answer was: "Where he grabbed into one pile with both hands and walked up."

Q. "Now, then, he walked toward the engine, didn't he?"

And your answer was: "Yes."

A. Walked up toward the engine.

Q. Wait, did you or did you not say then that you saw the very place where the man bent down and dug his hands into the ground and came up with wet sand?

A. I said I saw the prints of his fingers in the sand, unless I was misquoted.

Q. Now, here is your testimony. Suppose you read it.

A. I did not read that testimony before.

[fol. 85] The Court: What I want to know is what he says now.

By the Court:

Q. You told me just a minute ago that the place where you saw these marks was 35 or 40 feet from where you saw him put his hands down. Now, is that right?

A. No, from where the back of the engine—where the engine was.

Q. These marks that you saw?

A. You mean the slip marks?

Q. They were how far from where he put his hands down?

A. They were just cater-cornered up over the bank, maybe fifteen or twenty feet.

Q. All right, fifteeen or twenty feet. You tell us now what this is about wet sand. You remember that?

A. Well, I remember they asked me what——

Q. Do not tell us now what you said. Tell us what you know about wet sand. Did you see any marks in wet sand?

A. I saw finger marks in wet sand.

Q. Where was the wet sand?

A. Down in the Hastings Fuel siding.

Q. Is that anywhere near where you saw him stoop down to pick something up?

A. I probably think that was. It was about where he stooped to pick that up.

Q. Down on Hastings Fuel siding?

A. Down on Hastings Fuel siding.

By Mr. Richter:

Q. Then you saw him look up the bank toward the engine?

A. He turned for that track and went towards the train and then he went out of my sight.

[fol. 86] By the Court:

Q. These marks in the cinders, they were other marks, they were not finger marks?

A. They were the finger marks.

By Mr. Richter:

Q. The wet sand is where the finger marks were?

A. That is right, it wasn't scooped out, it was this way (indicating).

Q. That movement of Mr. Eckenrode, when he picked up this sand, was after he had been talking to the engineer, to Sunderlin, is that right?

A. That is right.

Mr. Richter: That is all.

Cross-examination.

By Mr. Rhoads:

Q. Mr. McGowan, on this movement there was your 22 cars, then there was an engine, then there was a tank, then the caboose or the cabin, at the end?

A. That is right.

Q. And Eckenrode, you say, was flagman?

A. Flagman or rear brakeman, that is right.

Q. Did he have anything to do with this movement after it started?

A. No.

Q. I think you said he was down on the Hastings Fuel track and walking along it when you saw him?

A. That is right.

Q. How far away was the Hastings Fuel track from the main track at that point?

[fol. 87] A. At that point?

Q. At that point.

A. Oh, twelve to sixteen feet.

Q. And then there is this embankment?

A. There is a slope there.

Q. A slight slope up to the main track?

A. Yes, sir.

Q. How far below that main track, in your opinion, was Hastings Fuel at that point?

A. At the point of the accident?

Q. Yes.

A. I would say about twelve feet. The rails were apart at that point.

By the Court:

Q. They were that far apart?
A. They were that far apart.
Q. How much below?
A. Oh, about five feet, four to five feet.

By Mr. Rhoads:

Q. Could you tell us what he was doing when he reached over, when he was down on the Hastings Fuel?
A. I couldn't say for sure what he was doing, I surmised that is what he done, because I went afterwards and looked, and I saw these finger prints in there and I know he walked away there. I surmised he walked away from there with something in his hand.
Q. When he turned and walked away from there with something in his hand, your train was moving up this grade, was it not?
A. Yes, slowly.

[fol. 88] By the Court:

Q. Did he walk up the embankment?
A. Walked towards the train.
Q. Up the embankment?
A. He didn't go direct up the embankment.
Q. Diagonally?
A. Diagonally, that is the word.

By Mr. Rhoads:

Q. And your train was moving at the time he turned and walked toward the embankment?
A. It was moving a short piece and starting and stopping again.
Q. How much of this movement had been completed when there were the toots of the whistle and the stopping?
A. About four car lengths or four and a half cars.
Q. About how much farther did you have to move?
A. I would say a good car, probably a car length and a half.
Q. After those toots did you get off and come back?

A. Pardon?

Q. After the signals for the movement to stop did you get off and come back?

A. When the whistle signal for brakes was given, I knew there was something wrong. I didn't know what, but I knew there was something wrong, and I started back on an inspection to see what happened, and I met the conductor and he told me what happened, and I proceeded right to the rear end right away and assisted in taking care of Mr. Eckenrode.

By the Court:

Q. Was he dead when you got there?

[fol. 80] A. Well, I don't think he was dead, no. He wasn't dead when I got there.

Q. He wasn't conscious, was he?

A. No, he wasn't conscious, he couldn't have been, but that is, he lived two or three minutes after I got there, but I wasn't more than a minute or a minute and a half getting down there. I wasn't *must* more than that after——

Q. How fast did the train move there when it did move? When it was not slipping, how fast did the whole train move?

A. Well, when you are making your coupling like that, the speed of a train there, making a coupling shouldn't be more than two or three miles an hour.

Q. Is that what your speed was?

A. No, we weren't making more than a mile and a half or two miles an hour when the accident happened.

The Court: All right.

By Mr. Rhoads:

Q. But you were moving about a mile to a mile and a half when the accident happened?

A. We were moving about a mile or a mile and a half an hour when the accident happened.

By the Court:

Q. Was this rod revolving pretty fast?

A. It keeps moving back and forth.

Q. Was it moving back and forth pretty fast?

A. When we weren't going it was moving fast, and when we were, it was very slow.

Q. When the engine slipped it moved very rapidly?
A. Yes.
Q. That was the bar that there was a mark on?
[fol. 90] A. Yes, the bottom of the lap and lead lever.
Q. That is the thing in the picture there that is marked?
A. Yes.

By Mr. Rhoads:

Q. I show you this picture D-6. Does that show the lap and lead lever up against the cylinder?
A. Right there (indicating).
Q. I show you D-5, and that shows the lap and lead lever back from the cylinder.
A. Yes.
Q. When you went back how far was Eckenrode's body away from the engine?
A. Well, when I went back I would say it was between three and four feet, and Mr. Ingoldsby was holding him up in his hands.
Q. Did you notice the sanders then?
A. Yes, I noticed they were running then. I told him to shut them off.
Q. Did you notice whether the sand was on the rail?
A. It was.
Q. Did you notice how far back it went?
A. Well, there was some below the switch point.
Q. How far did it extend? Did it extend from the switch point?
A. Well, I would say maybe a rail, a half a rail length below the switch point.

By the Court:

Q. Was it all the way back?
A. All the way from the——
Q. All the way from the point of the accident?
A. All the way from the point of the accident—it was on both rails pretty heavy.

[fol. 91] By Mr. Rhoads:

Q. From the point of the accident all the way back half a rail above the switch point?
A. Yes.

Q. And on both rails?
A. And on both rails.

Mr. Rhoads: That is all.

Redirect examination.

By Mr. Richter:

Q. How about to the front of the wheels? As you go ahead there was no sand there was there?
A. Oh, yes.
Q. Do you know what I am talking about now? When the engine came to a stop there was sand, you say, going back toward the switch, is that correct?
A. That is correct.
Q. I am talking about as you go ahead. Was there any sand ahead of that point?
A. I still don't understand.
Q. You have got how many wheels on an engine?
A. I have four drivers, and a trailer, and an engine truck.
Q. The sanders lie over the four driving wheels, don't they?
A. The first sander lies ahead of the first two drivers, and the next one comes down between the third and fourth drivers.
Q. You had sand running back from the point where the accident happened, back to the switch; I think you said something about that, didn't you?
A. What is that?
[fol. 92] Q. There was sand along the track from the point where the accident occurred, back to the switch?
A. That is right.
Q. Was there any sand on the track ahead, going up toward you?
A. Right up to the end of the wheel. Right up to where the drivers were standing there was sand on the rail.
Q. Was that in between or in front?
A. In front of the wheel.
Q. Did you go around the other side?
A. Yes.
Q. Did you go around to check the sanders?
A. I went around to carry Mr. Eckenrode away from the job altogether.
Q. Where did you go?

A. We put him on a stretcher, carried him around the cabin, up the other side, and took him out over the bank.

Q. Was there any comment made about the sanders at that time?

A. About what?

Q. About the sanders.

By the Court:

Q. Did anybody say anything about the sanders?

A. Yes, I called the engineer's attention to the fact that his sand was still running.

By Mr. Richter:

Q. Ordinarily, do you have the sand running the whole time while you are moving?

A. When you are slipping you do, yes.

Q. If you are not slipping do you have it running?

A. No.

Q. That is a regular run every day, is it not?

[fol. 93] A. Yes.

Q. That is a run that they make up and down that track each single day, to pick up cars in the mines and to place cars.

A. Six days a week, every day but Sunday.

Q. Ordinarily one engine is enough to carry those cars?

A. The shifting movement. One engine was enough to make the shifting movement.

Q. You can pull more than 22 with one engine, you can pull 26 or 28?

A. 28 ordinarily, that is the most.

Q. Even pulling 28 you can do it all right without any slipping?

A. Sometimes, sometimes we won't. They slip sometimes.

Q. Most of the time they slip it is on a wet day, or when the tracks are moist, for some reason or the other.

A. Not always. They don't always slip on a wet day. They will slip on a dry day too.

Q. What happens when you have more than 28 cars?

A. They just slip when they lose their traction.

Q. Why do they lose their traction?

A. That is beyond me. I can't answer that.

Q. In the ordinary move, the regular move that is made, when you are pulling between 22 and 28 cars, or pushing

between 22 and 28 cars over that particular stretch of road, you can make it all right without any slipping, can't you, the average move?

A. Not always, no. You can't always make the same movement. It doesn't follow that close. They vary every time. No two trains handle alike.

Q. Is there always sand dropped as you make that move? Do you always drop sand?

A. Not unless it is necessary.

Q. Why is it that on one day you use it and another day you don't?

A. I don't know. I am a trainman. I don't handle the sand or the engine. I can't answer that question.

[fol. 94] Q. There is not much difference in the load, is there?

A. There could be a good bit of difference in a load between 28 cars. Some cars are heavier than others.

Q. Wasn't the load that you were pushing this day less than the average load? It was only 22 cars.

A. I can't tell. I didn't count the tonnage. I can't say what it was. I know there were just 22 cars, that is all.

Q. They never used two engines to push those cars up there?

A. They couldn't. You would have two engines in the middle.

Q. They never put two together in the back end at all?

A. It has been done.

By the Court:

Q. Pushing how many?

A. If you had two engines in the back you could push 50 or 60.

By Mr. Richter:

Q. That is when they use the two, when they have a heavy load?

A. We don't use two engines in that branch.

Q. Did you ever use two engines together right in back of each other, both pushing?

A. Yes, lots of times.

Q. Both pushing? 22 or 28 cars is a good big load?

A. No, each engine has a tonnage. Whenever you put two engines together there you put tonnage for both. Each

engine has tonnage and when you double your tonnage you double your power.

Q. What is the ordinary tonnage for an engine of the kind that was used on that day?

A. At that branch?

[fol. 95] Q. Yes, at that branch, that type of move.

A. Oh, I suppose that engine would haul there twenty-four or twenty-five hundred tons. The tonnage is 1810 tons, that is for straight roadway, but I have pushed at least 2300 tons with an engine there.

Q. That is about how many cars such as you used that day?

A. Well, that would be 25 cars.

Q. If you have a tonnage of that kind, an ordinary engine can ordinarily make that run, can it not, without slipping and sliding all over the track like you were doing?

A. No, it slipped a good bit there several times, not only there but several places.

Q. On that movement, if you have that tonnage, and a good, clear, dry day, you slip like you did on this day?

A. Yes, I have done it.

Q. Were they loaded with coal—were they fully loaded cars on those occasions?

A. Fully loaded cars, yes.

Q. On previous occasions, when you have dropped sand, were you able to get traction right away as soon as sand was dropped so that the cars could make their move?

A. Not always.

Q. Of course, you would not know whether the sand was flowing right on those occasions, would you?

A. Not unless I would be there to see.

Q. At the time you gave your signal to come ahead were you fully aware of the whereabouts of the entire train and engine crew?

A. Yes, sir.

Q. Do you make a move until you know where everybody is?

A. Yes, sir.

Q. I say, do you make a move until you know where everybody is?

A. No, sir.

Q. Is that a rule?

[fol. 96] A. Absolutely.

Q. You cannot make a move until you know where everybody is, is that right?

A. Yes, sir.

Q. How about the engineer, before he acknowledges your signal, must he know where everybody is, before he acknowledges it and proceeds to move?

A. He is working with me. I direct him what to do.

Q. Did you have any trouble seeing the deceased at the time you gave your signal?

A. I couldn't have seen him.

Q. Why did you make this move?

A. I knew where he was at.

Q. Where was he?

A. In the caboose.

Q. I am now talking about the moment just before the accident. Don't you have to give a signal each time you make a new move?

By the Court:

Q. You do not give a signal each time the engine slips?

A. No.

By Mr. Richter:

Q. If the engine comes to a stop, is that right, when the engine comes to a stop do you have to give a new signal?

A. Not until the movement is completed.

Q. So that you give one signal for the entire move, is that right?

A Yes.

Q. How about before the engineer starts to move the train, no matter whether it is one single move that is intended or 16 different moves, is there any rule in regard to [fol. 97] the engineer, about what signals he must give when he is about to move?

A Yes.

Q. What does he do?

A. He blows two blasts of the whistle, that is, release brakes.

Q. Is that after each and every stop?

A. No, not in a shifting move.

Q. Do you know rule 30?

A. Not by number, no.

Q. Do you know the rule that requires the bell to be rung before each and every move is made?

A. Yes, sir.

Q. That means, no matter how many moves you make, when the engine is stopped the bell has to be rung.

A. Every move you make.

Q. The only signal you heard was two whistles?

A. Two whistles.

Q. You did not hear any ringing of the bell?

A. I didn't pay any attention whether it rang.

Q. You heard the whistles, anyway?

A Yes.

Q. You did not hear any bells?

A. I don't know, I can't say whether it rang or not.

Q. If the bell did ring you were not that far away that you would not have heard it, were you?

A. I could be.

Q. Were you paying attention for signals from the engineer?

A. Paying attention for the whistle signal.

Q. Weren't you paying attention for any signals that the engineer might give you?

A. The whistle signals.

Q. You knew that the train stopped after each skid?

A Yes.

Q. You knew that then again the engine would soon start thereafter?

[fol. 98] A. Yes.

Q. You knew that you were supposed to ring the bell after each and every stop?

A. No, sir.

Q. You don't know that?

A. You are not supposed to. The movement isn't completed until after I give him a signal and he answers my signal. The movement isn't completed until the job is done. That one signal completes the whole movement.

Q. Now, after each and every single stop of a train is it or is it not the rule of this railroad and every other railroad, rule 30, that before the engine may be moved again the bell must be rung.

A. This train didn't stop. That is the rule but this train didn't stop in that sense of the word. This train was in motion one way or the other at all times.

Q. After the skid it stopped?
A. It would run out and run in, run out and run in.
Q. After each skid it would stop?
A. It would stop and start back, and start to seesaw, he would catch it and start to ride again some.

By Mr. Rhoades:

Q. Where was Eckenrode when this movement started.
A. In the cab, the caboose.

Mr. Rhoads: That is all. Thank you.
The Court: I do not believe I will call another witness today.

(Recess at 4:00 P. M. to 10:00 o'clock October 30.)

[fol. 99] SECOND DAY

Plaintiff's evidence (continued).

The Court: Will you proceed, Mr. Richter.
Mr. Richter: Yes, sir.
May I call the actuary out of turn, if you please?
The Court: If you want to.
Mr. Richter: Can't we agree on life expectancy?
The Court: What is it?
Mr. Richter: 13 years.
The Court: How old was he?
Mr. Richter: 62, and the expectancy is 13 years.
The Court: Just tell us what it is. He was 62 years old?
Mr. Richter: Yes, sir.
Mr. Rhoads: I will agree, 13 years.
The Court: It is agreed that his life expectancy, according to actuarial tables, was how many years?
Mr. Rhoads: 13 years.
[fol. 100] The Court: All right, call your witness.
Mr. Richter: Mr. Sunderlin.

D. R. SUNDERLIN, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Richter:

Q. By whom are you employed, Mr. Sunderlin?
A. Pennsylvania Railroad.
Q. Were you so employed on the date of this accident?
A. Yes, sir.
Q. What was your job on that crew?
A. Fireman.
Q. You were a fireman. What were you actually doing at the time of this accident?
A. Running the engine.
Q. You were acting as engineer?
A. Yes.
Q. As such were you seated on the right-hand side?
A. Yes, sir.
Q. Had you been running the engine while it was down on the Hastings Fuel siding?
A. Yes, sir.
Q. Bring yourself down to the point where you made the coupling between the four cars you pulled off Hastings siding and the cars on the main track. At that time where was your engine in relation to the switch?
A. We went in on the Hastings Branch, Hastings 1, and got our cars, brought them out and set them up against the other 18.

[fol. 101] By the Court:

Q. When you set them up against the other 18 where was the engine?
A. About on the frog.

By Mr. Richter:

Q. What kind of a day was it?
A. A clear day.
Q. Dry?
A. Yes.
Q. Tracks dry?
A. Yes.
Q. What happened?

A. After we coupled them up Mr. McGowan was on the front end, he gave me a sign to move the train up against those other cars. I answered him with the two blasts.

Q. Then what happened?

A. I started to push up.

Q. Then what happened?

A. Occasionally the engine would slip.

Q. How far would you move before you would slip?

A. Maybe six or eight feet.

Q. What power did you give the engine?

A. You have to give her about all she's got.

Q. Did you do that on this occasion?

A. I suppose I did.

Q. Don't you know what you did?

A. Yes, I gave it enough power to move it.

Q. It would go six, seven or eight feet and then she would slip, is that right?

A. She would slip a little bit.

Q. Your engine was facing in the direction in which the cars were being pushed, is that right?

A. Yes, sir.

[fol. 102] Q. Where were you at that time, on your seat?

A. Yes, sir.

Q. You were seated on your seat?

A. Yes, sir.

Q. And were you looking ahead?

A. Yes, sir.

Q. Out the side window?

A. No, sir.

Q. How can you see out the top window when you are sitting?

A. Well, that is the way you run the engine.

Q. That little window can't be looked out of when you are sitting?

A. Absolutely. That is what it is put in there for.

Q. Is it not a fact that you can't see out of that front window when you are seated?

Mr. Rhoads. I object to cross-examining the witness.

The Court: For the same reason I am going to allow a good deal of latitude in the way of examination.

Mr. Rhoads: Then, will you note an objection to all questions of that kind on this whole line?

The Court: Yes. The same thing applies as I stated in connection with the other witness.

Mr. Rhoads: I just want to protect my position on the record, if you will grant me an exception to the entire line of questions.

The Court: Yes, you do not need any exceptions at all in this Court. However, it is all right. We like to have it.

[fol. 103] By Mr. Richter:

Q. Can you actually see out of that front window when you are sitting on your seat?

A. Yes.

Q. Did you hear what Mr. Ingoldsby said yesterday?

A. Oh, yes.

Q. That you have to stand to look out of that window?

A. (No answer.)

The Court: I do not know that he said exactly that. All right. We will leave it at that.

By Mr. Richter:

Q. In the position that you were seated looking out of that front window, how far could you see?

A. 22 cars, up where Mr. McGowan was.

Q. Could you see on the side along the train?

A. I could see alongside of the train.

Q. I beg your pardon?

A. You can see alongside the cars along the train.

Q. That is on the right-hand side of the train?

A. That is right.

Q. After you made your last slip prior to the accident, go on and tell us every single move you made. You came to a slip and you just slipped. What happened? What did you do?

A. Come again. I would like to have that repeated.

Q. You started to make a couple of moves and you slipped.

By the Court:

Q. Now, you slipped. Did you turn off the steam?

A. Sure, you close your throttle.

[fol. 104] Q. What is the next thing?

A. Then you open it again to get your train going.

By Mr. Richter:

Q. Did you do anything else?
A. The sand was running.
Q. Did you have the sand running the whole time?
A. You had to have.
Q. You mean you had your valve open and the sand was constantly running, is that right?
A. Yes, sir.
Q. That is, you had it open to run?
A. Yes, sir.
Q. Could you tell from the engine whether it was coming out? Could you see?
A. No, sir.

By the Court:

Q. What?
A. I couldn't see whether it was running or not.
Q. You have no way of telling in the engine whether it is running or not?
A. No, sir.
Q. What happens when it clogs up?
A. Then it is much worse.
Q. Does it show in the valve?
A. No, sir.

By Mr. Richter:

Q. You did all you could to get it open from the engine, is that what you mean?
A. Yes.
Q. Whether it was coming out or not you do not know?
[fol. 105] A. No, sir.
Q. You then started again, you gave it the throttle again, didn't you?
A. Yes, sir.
Q. Did you blow your whistle again?
A. Not after I started the first time.
Q. Did you ring the bell after that?
A. Not after I started the first time.
Q. Do you know rule 30?
A. Yes.
Q. I show you a book which I will have marked for identification as Plaintiff's Exhibit 1.

(Book entitled "The Pennsylvania Railroad, Book of Rules," was marked Plaintiff's Exhibit 1 for identification.)

By Mr. Richter:

Q. (Continuing) I show you a rule book of the Pennsylvania Railroad Company, the "Book of Rules", is that the regular book of rules that you fellows have?

A. Yes.

Q. Suppose you read rule 30?

A. This rule book is not complete.

Q. Is there any change in rule 30 in the book that you have?

A. I am telling you the stickers are not all in this book.

Q. Is there any change in rule 30? Do you have your book with you?

By the Court:

Q. Is rule 30 the rule that was in force? Is rule 30 in that book the rule that was in force at the time of the accident?

A. Yes, sir.

[fol. 106] Q. Then, all right.

A. "The engine bell must be rung when an engine is about to move, when running through tunnels while approaching and passing public crossings at grade, and when passing a train standing on an adjacent track."

By Mr. Richter:

Q. At the time of the last slip of the engine the train had come to a stop, had it not?

A. Normally about, maybe not.

Q. The train had come to a stop, had it not? It was not moving?

A. It was moving all the time, but the slack was pushing me back, and then it would slip and it would go right on ahead, it wasn't stopped.

Q. You did not come to a complete stop at all? Why did it go ahead if you cut off the steam?

A. You give it steam again to start it.

Q. Was that because it had come to a stop?

A. Well, it had slowed down when it slipped.

Q. The wheels started slipping, did they not?

A. Yes, sir.

Q. Your engine stood where it was, didn't it?
A. Yes, sir.
Q. It did not move?
A. It kept on moving up slowing, it hadn't the traction.
Q. Did you see Mr. Eckenrode at all around that time?
A. I saw him at the side of the engine where he walked up past us.
Q. You talked with him?
A. Yes, sir.
Q. The conversation was about getting the train going, wasn't it?
A. That was his conversation.

[fol. 107] By the Court:

Q. I want to get that straight. Where was he when he make this remark?
A. Your Honor, he was on the Hastings Fuel.
Q. He was on the Hastings Fuel track?
A. Yes, sir.
Q. In which direction was he walking?
A. Towards the front of the train.
Q. In the same direction the train was going?
A. Yes, sir.
Q. Was he walking about as fast as the train was going, or faster, or slower?
A. About as fast, I guess, as the train was going.
Q. All right. How far away from the place where you were sitting in the cab would he be when he made this remark that we were talking about?
A. Around ten or twelve feet.

By Mr. Richter:

Q. After that, when was the next time that you saw Mr. Eckenrode?
A. I saw him laying at the side of the engine.
Q. Then he was to the front of you, wasn't he?
A. Yes, sir.
Q. And he was a couple of feet to the right of the train?
A. That is right.
Q. Looking right out your side window you couldn't help seeing him lying on the ground.
A. I didn't look out the side window at him.

Q. I say, if you looked out the side window you couldn't help but see him, could you?

A. No.

Your Honor, do you wish to ask me another question?

The Court: No, that is all right.

[fol. 108] By Mr. Richter:

Q. By that you mean you would have seen him if you looked out the side window?

A. Yes.

Q. There was nothing to block your view out that side window, was there?

A. That is right.

Q. The window was open, was it not?

A. Yes.

Q. About how many times would you say that train slipped from the time you started at the switch frog to the point where the accident occurred?

The Court: Can you tell us?

The Witness: Your Honor, he said train.

The Court: No, the engine.

The Richter: The engine.

By the Court:

Q. How many times?

A. Six or eight, maybe.

Q. How many?

A. Six or eight times.

By Mr. Richter:

Q. Is it your duty to look ahead as the engineer?

A. Yes,

Q. You cannot move that train without looking ahead?

A. No, sir.

[fol. 109] By the Court:

Q. Can you tell me, you remember when you were down on Hastings siding, Ingoldsby fixed the sander, did he?

A. Yes, sir.

Q. How long in time, how many minutes do you suppose it was from the time he fixed the sander up to the time of the accident?

A. Well, Your Honor, it takes about five to seven minutes to pump up one car, three, or four, or five cars with air, and he says: "I am going to examine the air", and he said: "You make the couplings".

Q. What I want to know, without going into that, how long was it in minutes, as near as you can guess, from the time he fixed the sander until the accident happened?

A. Well, I imagine, Your Honor, that it may have been 20 minutes, maybe longer.

The Court: All right, Mr. Richter.

By Mr. Richter:

Q. Did you get out of the engine after the accident happened?

A. Yes, sir.

Q. Did you look at the sand along the tracks?

A. Yes, sir.

Q. Was it smooth and even all the way down?

A. Yes, sir.

Q. All the way from the front sander, all the way back to the frog?

A. Yes, sir.

Q. Was it on one side of the rail or both?

A. Both sides.

Q. It was smooth and even all the way down back to the frog.

[fol. 110] A. Yes, sir.

Q. That is on both tracks? Both sides of the train?

A. Yes, sir.

Q. And on both sides of each rail?

A. Yes.

Q. Did you notice what the condition of the sand was?

A. Running.

Q. I mean, was it wet or dry?

A. Dry.

Q. Was it any different than the sand that had come out over on Hastings Fuel?

A. No, sir.

Q. Pardon me?

A. No.

Q. Suppose you tell us something about the sanders. Is this an engine that has sanders both fore and aft at the wheels?

A. There is two sand pipes in front of the front drivers, and the middle drivers.

By the Court:

Q. When you talk about the front drivers and the middle drivers, just tell me which they are.

A. This is the front driver, Your Honor (indicating).

Q. Yes.

A. And this is the middle driver (indicating), and this is the sander here (indicating).

Q. What is this in here, this wheel (indicating)?

A. That is the third driver.

Q. What is this back here (indicating)?

A. That is the fourth driver.

Q. And that is the pilot wheel (indicating)?

A. Yes, that is the pilot wheel.

Q. There are four drivers?

A. Yes, sir.

[fol. 111] The Court: (To the jury) When he is talking about this, there are four driving wheels, you cannot see from here, but it is the four big wheels. You will have it. He has pointed out the four biggest wheels, which are called the driving wheels.

By the Court:

Q. Where did you see the pipes delivering the sand?

A. On the rail in front of the drivers and in front of the middle drivers.

Q. First, in front of the whole four drivers?

A. Yes, sir.

Q. And then the second pipe delivered between the——

A. Second and third drivers.

Q. —between the second and third drivers?

A. Yes, sir.

The Court: The jury can look at that.

By Mr. Richter:

Q. Did you have any sanders on that engine that would give you traction to the rear of each of the wheels?

A. No, sir.

Mr. Richter: Perhaps some of us have not heard that last answer.

The Court: (To the jury) There is a little pipe that comes down right in front of the first driving wheel. That shows where one sander comes down. It is right down almost touching the track.

Proceed.

[fol. 112] By Mr. Richter:

Q. Your sanders fall in front of the driving wheel, but not in back of the driving wheel?

A. Not on that engine.

Q. This type of engine is only for forward movement, you could not push those cars backwards using sanders, because the sand does not fall in that position, is that right?

A. Right.

Q. From the time that you came to a stop up until the time that Mr. McGowan came from the end of the twenty two cars down to the engine, did you move that train again at all? Or did you stand still the whole time?

A. After I whistled down, you mean?

Q. Yes.

A. She stood still.

Q. You stood still?

A. Yes.

Q. There is no doubt about that.

The Court: After what?

Mr. Richter: After he saw that Eckenrode was lying alongside the engine until McGowan walked about 1200 feet.

The Court: Yes.

By Mr. Richter:

Q. You did not move that engine a bit?

A. No, sir.

Q. The whole train stood at a standstill?

A. Yes, sir.

Q. About how long would you say that was in point of time?

[fol. 113] A. Not more than two or three minutes, maybe not that long.

Q. How long did you continue to remain there after McGowan got there?

A. We administered all we could to Mr. Eckenrode.

Q. Were you there another ten minutes?

A. Yes, sir.

Q. So that after you had administered to Mr. Eckenrode, then you went and looked at the sand? You first took care of Eckenrode?

A. Yes, sir.

Q. Was it after you administered to Mr. Eckenrode that you went and looked at the sand?

A. Mr. McGowan said, "The sand is still running, Don. You had better close off the sanders."

Q. About how long after you had gotten out of the engine was that?

A. I presume three or four minutes, maybe longer.

Q. Four or five minutes, or longer?

A. Yes.

Q. Do you know about how much sand that dome carries?

A. In weight?

Q. Yes, I mean what quantity of sand does it carry, do you know that?

A. (No answer.)

Q. Do you know the place where these engines have their pits cleaned?

A. Yes, sir.

Q. That is at the Cresson enginehouse, is it not?

A. Yes.

Q. Tell us where they keep the sand there.

A. In a sand barrel.

Q. How close is it to this pit?

A. About ten feet.

Q. A few feet above, ten or fifteen feet above?

A. In a small house, yes.

[fol. 114] Q. Have you ever watched them wash down the cinders with the hose there?

A. No, sir.

Q. Have you seen them doing it?

A. I walked past and seen them do it but I didn't watch them.

Q. The cinders are generally hot coming out of the engines?

A. Yes, sir.

Q. Do you see the evaporation of the steam rising up?

A. It goes into a pit.

Q. The steam rises up out of the pit?

A. Yes, I guess it does.
Q. To a certain extent?
A. Yes.
Q. The steam rises right up to where the sand is, doesn't it?
A. Yes, it does.
Q. And that is why your sand gets sticky, is it not?
A. No, sir.
Q. Have you had trouble with sand coming out on other occasions?
A. Them engines are inspected after they come over that pit, and they are all opened up.
Q. Have you had trouble after you got out towards the end of the enginehouse?
A. In wet weather.
Q. Even in dry weather, when that sand is put in the engine, do you or do you not frequently have trouble with that sand?
A. Not often.
Q. Not often?
A. Once in a while.

By the Court:

Q. Mr. Sunderlin, will the engines slip on that grade up to Red Top if the track is properly sanded?
[fol. 115] A. Well, it probably would, Your Honor, if you have a heavy load. The heavier the load the more it would slip.
Q. Then, if I understand what you say, even sanding will not prevent the engine slipping?
A. Not if you have a heavy load.
Q. Did you have a heavy load on this day?
A. It was a heavy load.

By Mr. Richter:

Q. You do not consider twenty-two cars of coal heavy with that engine, do you?
A. Yes, I do.
Q. Haven't you carried as many at twenty-eight and twenty-nine cars?
A. I never did.
Q. What is the maximum you have carried with that engine at that point?

A. I don't remember.

Q. Do you think you need two engines to push twenty-two cars up?

A. No, sir.

Q. Do you go through this slipping business every time you go past that point with 22 cars?

A. Well, maybe not always.

Q. When you have twenty-two loaded cars of coal like you had on this occasion, have you ever in your experience gone through the kind of slipping you went through on this day? Have you ever had on one single occasion the trouble you had this day, in all your experience?

The Court: Can you answer that question?

The Witness: I don't remember, Your Honor. We don't remember from day to day whether the engine slipped or not.

[fol. 116] By Mr. Richter:

Q. Then, you do not have any recollection of any single occasion, do you, at this time, that you have slipped the way you did with these twenty-two cars?

A. I have been with other men when we had twenty-eight cars and slipped.

Q. Twenty-eight cars?

A. And maybe twenty-four cars.

Q. You don't remember any twenty-two car load when you slipped at this point, do you?

A. No.

Mr. Richter: That is all. Cross-examine.

Cross-Examination.

By Mr. Rhoads:

Q. Do you recall ever having slipped with less than twenty-two cars there on that grade and that curve?

A. No, I don't recall.

Q. You say you were fireman on that engine on that day?

A. Yes, sir.

Q. You were also a qualified engineer at that time, were you not?

A. Yes, sir.

Q. You are still a qualified engineer?

A. Yes, sir.

Q. Eckenrode had been working that run for sometime, some period of time?

A. Yes, sir.

Q. He was familiar with the conditions there?

A. Yes, sir.

Q. You said, I believe, that the engine was on the frog [fol. 117] of the switch when this movement was started. Does the grade run up from about the frog as you start out?

A. Yes, sir.

Q. And that is the grade on the main track?

A. Yes sir.

Q. Ingoldsby had made his test with the sanders down on the Hastings Fuel track?

A. Yes, sir.

Q. You said you thought that was about twenty minutes before the accident happened?

A. Yes, sir.

Q. And then you had pulled out of the Hastings Fuel track and backed out with four cars on the main track?

A. Yes, sir.

Q. And you had coupled those?

A. Yes, sir.

Q. Eckenrode made the coupling?

A. Yes, sir.

Q. And he was rear flagman?

A. Yes, sir.

Q. Did you see where he went after he made the coupling?

A. He went back to the cabin.

Q. Did he have any duties in connection with that movement after he went back to that cabin?

A. No, sir.

Q. You started your movement, and what distance was that movement going to be?

A. Well, I presume about five or six car lengths, until we coupled up.

Q. How much of that movement had you completed at the time the accident happened?

A. I would say about three or four car lengths.

Q. So that you had one to two car lengths to go still?

A. Something like that.

Q. You say that Eckenrode went back to the cabin?

A. Yes, sir.

[fol. 118] By the Court:

Q. That was after he coupled the four to the eighteen?
A. Yes, Your Honor.

By Mr. Rhoads:

Q. And that was before you started the move?
A. Yes, sir.
Q. After you had started the movement you, I think, said you saw Eckenrode again?
A. Out of the side of the cab of the engine.
Q. How far had you moved, just approximately how far had you moved when you saw him then?
A. Probably a car length, a car and a half.
Q. Were you moving when you saw him?
A. Yes, sir.
Q. And he was down on the Hastings Fuel track?
A. Yes.
Q. He was how many feet below the main track?
A. About ten or twelve feet.
Q. And he was ten to twelve feet away from you?
A. Yes, sir.
Q. I think in answer to Mr. Richter's question you said there was some conversation?
A. Yes, sir.

The Court: What did he say? I want to know.

By Mr. Rhoads:

Q. What did he say?
The Witness: Shall I tell him, Your Honor?
The Court: Tell him exactly what he said, just exactly as you can remember.
[fol. 119] The Witness: He said: "Big boy, if you can't push them cars up I will get the bar and bar them."
Did you want me to tell everything?
The Court: Tell everything that was said.
The Witness: I said: "Bull shit on this junk".

By Mr. Rhoads:

Q. What did he mean by "the bar"?
A. It is in the cabin car for breaking things down or any repairs that have to be made around the train.
Q. A crow bar, isn't it?

A. Yes, a crow bar.

Q. Have you ever seen a trainman use a bar to help move an engine up a grade?

A. No, sir.

Q. He was joking, was he not?

A. Yes, sir, so was I.

Q. You didn't see him after that?

A. Not until he laid alongside.

Q. Until he laid along the side?

A. No, sir.

Q. Why were you looking out the front window?

A. Well, when the engine was slipping you could handle your throttle better by looking out the front window than you could by leaning out the side window.

Q. To handle the throttle you have to be inside the cab and looking out the front there?

A. Yes, sir, to handle it when it is slipping.

Q. Looking out that front window you said you could see alongside of the side of the cars?

A. Along the side of the train.

Q. Could you see along the side of the engine?

A. No, sir.

[fol. 120] Q. Why not.

A. Because you couldn't see down the side of the engine out that front window. You have to look out the side window.

Q. Is there a running board there?

A. Yes, sir.

Q. How high is that from the ground?

A. About six feet.

Q. When you saw Eckenrode's body what did you do, catch it out of the side of your eye?

A. Out of the side view of the window—side view.

Q. At that time the body, his head was about four or five feet from the engine?

A. Yes, sir.

Q. And his feet were down this bank?

A. Yes, sir.

Q. Is that a fairly steep bank there?

A. Not so steep, it is slanting.

Q. It is a sloping bank?

A. It is sloping.

Q. You were looking forward for McGowan's signal, were you not, too?

A. Yes, sir.

Q. To complete the movement?

A. Yes, sir.

Q. Did the engine stop at all during this movement that you made prior to the time that you blew the whistle to stop it?

A. No, it slipped and then it would go on again, never stopped.

Q. It never stopped, it was always moving?

A. It was always moving slightly.

Q. When you got out, I think you said your sanders were working?

A. Yes, sir.

Q. Were all four pipes working?

A. Yes, sir.

[fol. 121] Q. Were they throwing the sand on the rails?

A. Yes, sir.

Q. Did you notice whether they had been working from the time the movement started?

A. Yes, sir, we looked back.

Q. You looked back along the rails?

A. Yes, sir.

Q. Back to the frog?

A. Yes, sir.

Q. And they showed sand on the rails back to that point?

A. Yes, sir.

Q. Could you have started that train on that grade and that curve that day if the sanders had not been working?

A. You might have started it but you wouldn't have pushed it.

Q. After you found Eckenrode's body and stopped your train there, how long altogether were you stopped, do you know?

A. From 12:10 until after 4:00 o'clock.

Q. You stood there in that position?

A. Yes, sir.

Q. Did you get orders then to complete the movement?

A. Yes, sir, after the coroner, Mr. Mellon, had come, we got orders and moved our train up and coupled up.

Q. And you had about one and a half to two car lengths to complete the movement?

A. About one or one and a half.

Q. You made that movement all right?

A. Yes.

Q. The sanders worked all right on that?
A. Yes, sir.

Mr. Rhoads: That is all, thank you.

[fol. 122] Re-direct examination.

By Mr. Richter:

Q. Why did you get out to look back at the sand if you knew your sanders were working all right and if there was no reason to suspect there was something wrong with the sand?
A. You could see right along.
Q. Did you go back looking for it?
A. You don't need to go back, you can see.
Q. Did you go back looking for it?
A. No.
Q. When you went back weren't you carrying Mr. Ingoldsby?
A. I didn't carry Mr. Ingoldsby.

The Court: Mr. Eckenrode.
Mr. Richter: Mr. Eckenrode.

By Mr. Richter:

Q. Did you look underneath the train to look at the track?
A. We looked it all over after the accident was over.
Q. On both the inside of the rail and on the outside?
A. On top of the rail, on the inside.
Q. You looked at the track because you wanted to see if there had been sand on both sides?
A. There was.
Q. Why did you do it, if you had no reason to suspect there was something wrong with the sander?
A. I wasn't suspecting. Mr. Ingoldsby told me it was working, and I took his word for it.
Q. Why did you go back and check on both sides of the track if he told you it was working and you took his word [fol. 123] for it and everything was satisfactory? Why did you go back and check on both sides of this train?
A. I didn't say I checked on both sides. I looked through in there.
Q. Why did you bend down and look through in there?
A. I was down on the level track and she was up and you could look and see the sand there.

Q. Wasn't it because you wondered if the sand was working?

A. No, sir.

Q. Ordinarily when you turn on your sander you don't go down out of the engine to check on it to see if it is working, do you?

A. No, sir.

Q. You just operate it right from the engine, do you not?

A. A wheel on the engine, let the air go.

Mr. Richter: That is all.

Mr. Rhoads: One more question.

Re-cross examination.

By Mr. Rhoads:

Q. Had Mr. Eckenrode been working with your gang for some time?

A. Well, I had been on there three and a half years, and he had been on. I presume I had been about three and a half years and he had been there before I was.

Q. He had been a member of that gang for some years?

A. Yes, sir.

Mr. Rhoads: That is all, thank you.

Mr. Richter: Mr. Eckenrode, will you take the stand please?

[fol. 124] Lawrence R. Eckenrode, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Richter:

Q. Mr. Eckenrode, you are the son of the deceased, are you not?

A. I am.

Q. By whom are you employed?

A. Pennsylvania Railroad.

Q. Where?

A. At Cresson enginehouse.

Q. That is the enginehouse out of where these engines come, is it not?

A. That is right.

Q. Are you familiar with the ashpit?

A. I am.

Q. Will you tell us how close the sand box is to this ashpit?

A. Do you mean where they store sand?

Q. Where they store the sand as they put it into these engines.

A. Well, I would say about ten or fifteen feet from the sand box.

Q. About how high above it is it?

A. About the same, I would say.

Q. Will you tell us what they do with these ashes that go into these pits?

A. They are shaken down from the grates of the engine into the ashpit and they are washed from there.

Q. They are washed you say? With what?

A. Hose, water pressure.

Q. Will you tell us what one can observe as they wash [fol. 125] these hot coals as they come out of the grates of these engines?

A. Steam coming off the hot ashes.

Q. Where does that steam go?

A. It sprays out.

Q. Does it go directly towards that box where they keep all that sand?

A. Well, naturally it wouldn't go directly, it would just spray out around over it.

Q. You say over it?

A. Yes, sir.

Q. Have you observed what is done with the engines after they have been sanded and as they go out of the enginehouse?

Mr. Rhoads: I object to that. If Your Honor please, as far as I can see on the face of this testimony, it is absolutely immaterial.

The Court: I do not know what he is going to say. I will overrule the objection.

The Witness: What is the question?

By the Court:

Q. He says, have you observed the engines after they go out of the roundhouse?

A. On many occasions I would say practically on all occasions, when the engine comes across the pit, due to the shortage of the men there, they make a check on their sand, and they open the sand at that point; then the engine crosses a turntable and goes to the outbound track, which I work on the outbound track and time after time the sand has to to opened.

[fol. 126] By Mr. Richter:

Q. What?

A. The sand has to be opened again.

Q. Why is that. What is wrong with the sand?

A. Wet sand. Clinkers in it.

Q. Has that happened very frequently?

A. Yes, it does.

Mr. Richter: Cross-examine, please.

Cross-examination.

By Mr. Rhoads:

Q. Were you working there on October 8, 1943?

A. No, I wasn't.

Q. So you don't know what time this engine went out or whether it went out over the ashpit or whether the ashes were taken out on that day?

A. It has to go through that.

Q. You don't know whether or not the ashes were taken out on that day and you don't know what time the engine went out.

A. I don't know but I know that is regular procedure.

Mr. Rhoads: That is all.

Mr. Richter: That is all.

Mr. Richter: May I have the earnings record please, Mr. Rhoads?

Mr. Rhoads: Yes, Mr. Richter.

The Court: You can just put an agreed statement in.

[fol. 127] Mr. Rhoads: I think we can. Mr. Richter wants to have him take the stand, Your Honor.

The Court: I do not see why you want to waste time if the defendant is ready to agree.

Mr. Rhoads: We are ready to agree.

Mr. Richter: I want to show what the pay raises have been since that date.

The Court: You can agree on that.

Mr. Rhoads: I think we can agree on that.

Mr. Richter: Let us see if we can agree on that.

The Court: Go ahead. I imagine it is just about as short.

ALBERT L. MARTIN, having been duly sworn, was examined and testified as follows:

Direct examination.

By the Court:

Q. What is your position with the railroad?

A. Working in the timekeeper's office.

Q. What was Mr. Eckenrode earning at the time of his death, on October 8, 1943?

A. I just don't understand how you mean that, Your Honor?

[fol. 128] Q. How much was he making per week, per month, or per year, any way you want to put it?

A. We will take the year 1942. That is the year previous.

The Court: All right.

The Witness: He earned $2432.53.

By the Court:

Q. 1943, up to the time of his death, up to October 8, how much did he earn?

A. $1989.00.

Q. Have there been any raises in brakemen's pay since 1943?

A. Yes, sir, 18½ cents an hour.

Q. What percentage does that make? How does that figure out percentagewise?

A. I don't know. It is figured by the hour and I don't have any figures.

Q. Can you give an estimate?

A. I would say probably basing it on the eight hour day it would be about $355 increase in the year.

Q. Is that the only increase there has been?

A. Since that time, yes.

By Mr. Richter:

Q. Did they not have a nine cent raise? Didn't they have a nine, a two and a half and a sixteen altogether?

A. Yes, that was before that.

Q. When was the nine cent raise?

A. That was in 1943. That is included in the $1900 there.

Q. It was not included in the figure for '42, was it?

A. No, it didn't happen there.

[fol. 129] By the Court:

Q. Take the 1942 figure. What has been the total raise since that?

A. Well, that would be 18½ plus 9.

Q. That is 27 cents?

A. That would be 27½ cents.

Q. What were they getting an hour before that, in 1942, before the raise? What were they getting per hour?

A. Well, I don't have the figure to tell you that.

By Mr. Richter:

Q. Isn't the total actually $680 a year additional for that 27½ cents?

A. That is about what it would be. It is a fair figure, yes.

Q. These men have seniority, do they not, as they work on the railroad?

A. I understand they do, yes.

Q. Can you tell us how many years Eckenrode was with the railroad?

A. No, we do not have anything to do with the personnel records.

The Court: You can state that.

Mr. Richter: 42 years, going on 42 years.

Mr. Rhoads: I think that is right. I think he had been with the railroad about 42 or 43 years.

Mr. Richter: That is all.

[fol. 130] Cross-examination.

By Mr. Rhoads:

Q. When did the 18½ cent raise go into effect, when was that granted?

A. When it was started it was 16 cents, which was granted effective January, and then 2½ cents.

By the Court:

Q. Of what year?

By Mr. Rhoads:

Q. Of what year?

A. 1946, January, 1946, 16 cents, and then on May 22, 1946, 2½ cents.

Mr. Rhoads: That is all, thank you.

Mr. Richter: Mrs. Eckenrode, will you take the stand please?

JULIA ECKENRODE, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Richter:

Q. Mrs. Eckenrode, you are the widow of the late John Eckenrode?

A. Yes.

[fol. 131] The Court: You will have to answer a little bit louder so that the stenographer can hear you. He does not see you nod your head.

The Witness: I am.

By Mr. Richter:

Q. Did you have any children living at home with you at the time of his death?

A. No, I didn't.

Q. How about your daughter, Rita?

A. Well, just the invalid daughter, that is all.

Q. What is wrong with your daughter Rita?

A. Her mental condition.

Q. Was that her condition at the time of your husband's death too?

A. Yes, sir.

Q. Did your husband live at home with you and your daughter?

A. Yes, sir.

Q. How many years had you been married at the time of his death?

A. 40.

Q. What was the condition of your husband's health?

A. Perfect.

Q. Suppose you describe him for us. How big a man was he?

A. He was about five feet seven or eight inches.

Q. About how much did he weigh?

A. Oh, about 150.

Q. He worked steadily?

A. Yes, sir.

Q. What did he do with his pay each two weeks when he received it?

A. He gave it to me.

Q. Did you take care of the family finances with it?

[fol. 132] A. Yes, sir.

Q. And did you take care of the rent, or whatever it was, that you had to pay on your property, and buy the food out of that money, and clothing for everyone, and medical care?

A. Yes, sir.

Q. And the care of your daughter Rita too?

A. Yes, sir.

Q. Was it your husband's funds that supported Rita and yourself exclusively?

A. Yes, sir.

Q. Did your husband keep some of that pay for himself or did you give him some small sum each week that he used for his own personal needs?

A. He just gave it to me. If he needed any he got it.

By the Court:

Q. How much did he generally use himself in a month or in a week? How much per month would he take out for his own use, or would he take back from you?

A. He wouldn't take very much.
Q. How much would you say?
A. Maybe four or five dollars out of each pay.
Q. How often did they pay him?
A. Every two weeks.
Q. That would be eight or ten dollars a month?
A. Yes, sir.
Q. Did he buy his own clothes?
A. That was mutual, we bought them together.
Q. That was out of the money he gave you?
A. Out of the money, yes.

Mr. Richter: Excuse me, Your Honor.

[fol. 133] By Mr. Richter:

Q. Is your daughter still living with you now?
A. Yes, sir.
Q. What was your husband's age at the time of his death?
A. He was 62 in April.

Mr. Richter: Cross-examine.

Cross-examination.

By Mr. Rhoads:

Q. How old is Rita? How old was Rita then?
A. She was 25.
Q. 25?
A. Yes, sir.
Q. And the food for all of you was also bought out of that money?
A. What?
Q. All the food was bought out of that money?
A. Yes, sir.

By the Court:

Q. How old are you?
A. 64.

By Mr. Rhoads:

Q. And the rent for all of you?
A. Yes, sir.
Q. Out of that?
A. Yes, sir.

[fol. 134] Mr. Rhoads: That is all, thank you.

The Court: That is all.

Mr. Richter: I want to offer in evidence, if Your Honor please, the Interstate Commerce rules as to agency, ownership and instrumentality.

At this point, if Your Honor please, the plaintiff rests.

The Court: The plaintiff rests.

Mr. Rhoads: May we see Your Honor at side-bar for just a moment?

The Court: I think it is a good time to recess for ten minutes.

Mr. Richter: There is one witness I want to call for a minute, Your Honor.

The Court: All right.

Mr. Richter: Mr. Ingoldsby, will you come back for a minute, please?

W. J. Ingoldsby, recalled.

Direct examination.

By Mr. Richter:

Q. How old were you when you retired, Mr. Ingoldsby?
A. 68.

[fol. 135] Mr. Richter: That is all.

The Court: The plaintiff now rests.

Mr. Richter: Yes, sir.

The Court: We will recess for ten minutes.

(Recess at 11:05 A. M.)

(The defendant submitted the following motion for a directed verdict:

"Motion for Directed Verdict Under Rule 50

"The learned Trial Judge is requested to charge the jury on behalf of the defendant as follows:

" 'Under all the evidence your verdict must be for the defendant,'

and in support of the above request the defendant assigns the following reasons:

"1. There is no evidence of any negligence on the part of the defendant.

"2. There is no evidence that any negligence on the part of the defendant was the proximate cause of the fatal injuries to the plaintiff's decedent.

"3. There is no evidence of any violation of the Safety Appliance Acts by the defendant.

"4. There is no evidence that any violation of the Safety Appliance Acts was the proximate cause of the injury to plaintiff's decedent.

[fol. 136] "5. The evidence shows that the sole and proximate cause of the plaintiff's decedent's injury was the negligence of plaintiff's decedent."

(S.) "Owen B. Rhoads, Attorney for Defendant.")

The Court: The motion for a directed verdict is denied and an exception granted.

Mr. Richter: With Your Honor's permission I would like to call another witness.

The Court: Yes.

Mr. Richter: Mr. Bowers.

James T. Bowers, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Richter:

Q. By whom are you employed, sir?

A. Pennsylvania Railroad.

Q. How long have you been employed by the Pennsylvania?

A. 17 years.

Q. In what capacity?

A. Engineman.

Q. Are you familiar with the sanders and the operation of sanders on engines?

[fol. 137] A. I am.

Q. Did you hear the testimony in this case?

A. I did.

Q. It has been testified that after this last move took place, that McGowan, the hind brakeman walked from the end of the twenty-two cars, a distance of some twelve or between a thousand and twelve hundred feet along the way back to the engine and that there they administered aid to Mr. Eckenrode, and thereafter it was noticed that the sanders were still running and that the sand was noticed to be lying evenly and smoothly along the tracks. Will you go on and tell us whether or not in your experience if the sanders are working properly, you will have an even and smooth line at the point where those sanders are pouring out on the track?

A. No, sir, you will not.

Q. Will you go on and tell us what size pile you will have?

The Court: I do not think there was any testimony as to exactly what there was at the point where the sanders were working.

Mr. Rhoads: The testimony was that it was even and smooth all the way back.

Mr. Richter: He said he saw it all the way along.

The Court: All right.

By Mr. Richter:

Q. Will you go on and tell us what it would look like at the point where the sanders actually poured right down on the track?

A. If the sanders are working properly you will have a [fol. 138] sand pile, I just couldn't describe the length of it, but on either side of the track it would be about that wide (indicating).

Q. Will you stand up so we can see?

(Witness stands up and indicates.)

Mr. Richter: That would be 18 inches. Can you agree on that, in diameter?

The Court: As I understand it, no witness has testified that there was no pile of sand at the point where the sanders were working. We do not want that misunderstood in any way. You can call back some of the other witnesses if you want to. It is my understanding that what they said was when they looked back along the track.

By Mr. Richter:

Q. About how high would that be, besides being spread out that way?

A. Well, it would be up covering the bottom of the sand pipes.

Mr. Richter: All right.

By the Court:

Q. How many minutes would you say that would take to make that kind of a pile?

A. Well, that would take—you say how many car lengths? 22 car lengths?

Mr. Richter: Yes.

[fol. 139] The Court: I am asking you how many minutes it would take to make the kind of a pile you say.

The Witness: Well, approximately five minutes.

The Court: All right.

Mr. Rhoads: No questions.

Mr. Richter: That is all, thank you.

The plaintiff rests.

DEFENDANT'S EVIDENCE

Mr. Rhoads: Mr. Sunderlin, will you take the stand?

The Court: I have denied the motion for a directed verdict.

D. R. SUNDERLIN, recalled.

Direct examination.

By Mr. Rhoads:

Q. Mr. Sunderlin, you testified that you saw the sanders running after you were out there on the bank?

A. Yes, sir.

Q. Will you tell us whether there was a pile of sand there or not?

A. A small pile at each sander by the rail.

[fol. 140] Q. How large a pile was it that you saw?

A. Well, it would be up to the top of the rail. I judge perhaps that much at the time (indicating).

Mr. Rhoads: Can we agree that that is six to eight inches?

Mr. Richter: Six to eight inches.

By Mr. Rhoads:

Q. About six inches high?
A. Yes, sir.
Q. And then the sanders were turned off?
A. I got up and turned them off.

Mr. Rhoads: That is all.

Cross-Examination.

By Mr. Richter:

Q. That was after you administered to Mr. Eckenrode, was it not?
A. Yes.
Q. Some ten or fifteen minutes after this thing happened?
A. Three or four or five minutes, probably.
Q. Was that four or five minutes from the time that you got out of the engine?
A. Yes, sir.

Mr. Richter: That is all.
Mr. Rhoads: That is all.
Mr. Rhoads: Mr. McGowan.

[fol. 141] Joseph B. McGowan, recalled.

Direct examination.

By Mr. Rhoads:

Q. Mr. McGowan, I think you testified that you were the second person, were you not, to reach Eckenrode's body?
A. Outside of Mr. Ingoldsby and Mr. Sunderlin, I was the third, I would really be the——
Q. You testified, I believe, that when you arrived there the sanders were running?
A. That is right.
Q. Did you see a pile of sand there?
A. I did.

Q. How large was that pile of sand?

A. Well, probably, I would say, it would be about a half a peck in each one.

Q. About how wide at the base?

A. Oh, about that wide (indicating).

Q. About that high (indicating).

By the Court:

Q. About a foot by six inches?

A. That is about right.

By Mr. Rhoads:

Q. About a foot wide and about six inches high?

A. That is right.

Q. I think you testified that you got back there about —in about how many minutes?

A. Well, between three and four minutes.

[fol. 142] By the Court:

Q. How soon after you got back did Sunderlin turn off the sand?

A. Well, I came back and right away I kneeled down beside Mr. Eckenrode and Mr. Ingoldsby and I looked up and the sand was running then. I noticed the sand at that time, and I looked at the sand and said: "Don, your sand is still running," and he crawled up on the engine right away and shut it off.

Mr. Rhoads: That is the defendant's case, Your Honor. I want to offer in evidence the various exhibits that have been identified.

The Court: All exhibits identified are received in evidence.

(Book of Rules of the Pennsylvania Railroad, previously marked Plaintiff's Exhibit 1, was received in evidence.)

(Photograph entitled "26478, Hastings, Pa., 10-14-43, looking north from a point on the main track about at the frog of the Hastings Fuel Company mine siding" previously marked Defendant's Exhibit 1 for identification, was received in evidence.)

(Photograph entitled "26475, Hastings, Pa., 10-14-43, looking south from a point on the east bank of the main track with camera about 375 feet north of point of switch, Hastings Fuel Co. siding switch" previously marked De-

fendant's Exhibit 2 for identification, was marked in evidence.)

[fol. 143] (Photograph entitled "26477, Hastings, Pa., 10-14-43, looking north from a point on main track just south of Hastings Fuel Co. siding switch," previously marked Defendant's Exhibit 3 for identification, was marked in evidence.)

(Picture entitled "27532, Pitcairn, Pa., 4-2-46, engine 3483, type L-1s, stoker fired, right side and front end" previously marked Defendant's Exhibit 4 for identification, was received in evidence.)

(Photograph entitled "27533, Pitcairn, Pa., 4-2-46, engine 3483, showing right side of cylinder and position of lap and lead lever, with piston guide at rear of guide box" previously marked Defendant's Exhibit 5 for identification, was marked in evidence.)

(Picture entitled "27534, Pitcairn, Pa., 4-2-46, engine 3483, showing right side of cylinder and position of lap and lead lever, with piston guide at front of guide box, limit of travel forward," previously marked Defendant's Exhibit 6 for identification, was received in evidence.)

The Court: What is that, your points for charge?

Mr. Rhoads: Yes, Your Honor.

The Court: I think you can go to the jury right now, gentlemen, and I would like to have you limit yourselves to not more than a half hour each. Can you do that?

Mr. Rhoads: That will be perfectly satisfactory.

The Court: So that we can get through at 12:30.

(Mr. Richter argued the plaintiff's case to the jury.)

[fol. 144] (Mr. Rhoads argued the defendant's case to the jury.)

Mr. Richter argued the plaintiff's case in rebuttal.

The Court: Members of the jury, I will not charge you before lunch, but I will ask you to come back today at 1:30. Get your lunch early and be back here at 1:30 and I will charge you at that time. You can be excused now.

(Luncheon recess 12:15 to 1:30 P. M.)

(The jury returned at 8:45 P. M.)

The Court: Will the jury please rise?

(The jury rose.)

VERDICT

The Court: Members of the jury, have you agreed upon your verdict?

The Foreman: We have.

The Clerk: In the case wherein Julia Eckenrode, Administratrix of the Estate of John Henry Eckenrode, deceased, is the plaintiff and the Pennsylvania Railroad Company is the defendant, how say you, do you find for the plaintiff or for the defendant?

The Foreman: For the plaintiff.

The Clerk: How do you assess the damages?

The Foreman: $10,000.

[fol. 145] The Clerk: Members of the jury, hearken unto your verdict as the Court hath recorded it in the issue joined in this case wherein Julia Eckenrode, Administratrix of the Estate of John Henry Eckenrode, deceased, is the plaintiff, and Pennsylvania Railroad Company is the defendant, you say you find for the plaintiff and assess the damages at the sum of $10,000, and in answer to interrogatories you say as follows:

To interrogatory number 1:

"Was the sander working properly at or immediately before the time of the accident?"

Your answer is, "Yes".

To interrogatory number 2:

"Apart from any question about the sander did the engine fail to meet with the requirements of the Boiler Inspection Act in any other particular?"

Your answer is, "No".

To interrogatory number 3:

"Was Sunderlin negligent in not seeing Eckenrode after their conversation?"

Your answer is "Yes".

To interrogatory number 4:

"Was there anything which a reasonably careful man in Sunderlin's position should have done which would have avoided the accident even if he had been watching Eckenrode to the best of his ability?"

Your answer is "Yes".

To interrogatory number 5:

"Was there any negligence on the part of Eckenrode which caused or contributed to the accident?"

Your answer is "Yes".

To interrogatory number 6:

"Is your verdict for the defendant or the plaintiff?"

Your answer is "plaintiff".

To interrogatory number 8:

"Was the failure of the sander to work or of the engine [fol. 146] to comply with the requirements of the Boiler Inspection Act the cause of the accident"?

Your answer is "No".

To interrogatory number 9:

"What was the total pecuniary loss suffered by Mrs. Eckenrode as a result of her husband's death?"

Your answer is: "$20,000".

To interrogatory number 10:

"By what sum do you diminish the damages by reason of Eckenrode's negligence, if any?"

Your answer is: "$10,000".

To interrogatory number 11:

"If your verdict is for the plaintiff, what is the amount of your verdict?"

Your answer is: "$10,000".

and so say you all?

The Jury: We do.

The Clerk: You are excused until tomorrow morning at 10:00 o'clock and you will please report in court room number 1.

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

John H. Nicholls, Court Reporter.

November 6, 1946.

[fol. 147] IN UNITED STATES DISTRICT COURT

JUDGMENT [FOR PLAINTIFF]—Filed October 30, 1946

Before KIRKPATRICK, J.:

And Now, to wit: October 30th, 1946, in accordance with the verdict, it is Ordered that Judgment be and hereby is entered in favor of Plaintiff, Julia Eckenrode, Admx. of the Estate of John Henry Eckenrode, deceased and against the Defendant, Pennsylvania Railroad Company, in the sum of Ten Thousand and 00/100 ($10,000.00) Dollars, together with costs.

By the Court:

Attest: Gilbert W. Ludwig, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR DIRECTED VERDICT UNDER RULE 50

See notes of testimony page 168; Appendix, page 135a.

[fol. 148] IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO SET ASIDE VERDICT AND JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR DIRECTED VERDICT UNDER RULE NO. 50

And Now, to wit, this seventh day of November, 1946, the Defendant moves the Court to set aside the verdict and the judgment entered thereon in accordance with Defendant's motion for directed verdict under rule 50, presented to the Court at the close of the evidence.

Defendant further moves the Court in accordance with the provisions of Federal Rule of Civil Procedure 62(b), to enter an order staying, without bond, the execution of or

any proceedings to enforce the judgment entered on said verdict on October 30, 1946, until ten days after the disposition of Defendant's motion to set aside judgment and verdict.

Philip Price, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER STAYING EXECUTION OF PROCEEDINGS—Filed November 12, 1946

Before KIRKPATRICK, J.:

And Now, to wit, this 12th day of November, 1946, on motion of Philip Price, Esquire, attorney for Defendant, it is ordered that execution of or any proceedings to en- [fol. 149] force the judgment entered in the above case on October 30, 1946, be and they are hereby stayed, without bond, until ten days after the disposition of Defendant's motion to set aside verdict and judgment.

By the Court.

Attest: (S.) Leo A. Lilly, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

OPINION SUR DEFENDANT'S MOTION FOR JUDGMENT—Filed January 7, 1947

Before KIRKPATRICK, J.:

This is an action under the Federal Employers' Liability Act for damages for the death of the plaintiff's husband. The complaint also stated a cause of action under the Boiler Inspection Acts but upon that issue the jury, answering interrogatories, found in favor of the defendant. The jury found further that Eckenrode's death was caused by the negligence of an employee of the defendant and that it was contributed to by negligence on the part of Eckenrode, and diminished the damages by 50 per cent as a result of the latter finding. The defendant has moved for judgment upon its request for a directed verdict.

The facts, stated most favorably to plaintiff's case, and drawing all reasonably possible inferences going to support the verdict, are as follows:

Eckenrode was a brakeman 62 years old and had been [fol. 150] employed by the railroad for 42 years. The accident occurred about noon on October 8, 1943, a clear, dry day. At the point of the accident the main track was on an upgrade toward the north. A short distance to the south, a siding, known as the Hastings Fuel Siding, diverged from the main track to the right, also in a northerly direction but on a down-grade, so that between the arms of the Y formed by the two tracks there was a small embankment, with the main track above and the siding below.

The defendant's train consisting of 22 loaded coal cars was moving up-grade on the main track in order to couple the head car to some other cars which were standing at the top of the grade. The engine was at the rear of the train, headed forward and pushing. Eckenrode, in the performance of his duties, made a coupling, threw the switch at the Hastings Fuel siding so that the train could proceed up the main track and returned to the caboose behind the engine, after which the whistle was blown, the bell rung and the movement began.

After passing the switch, the engine had about 200 feet to go in order to complete the movement. The train was a heavy one and, in spite of the fact that the track sanding equipment was operating properly, the grade was such that from time to time the driving wheels of the locomotive would slip and the train momentarily lose headway.

The locomotive was being driven by Sunderlin, the fireman, who was also a qualified engineer. He was sitting in the cab on the right side. Shortly after the movement began, the engine being then at a point about 50 feet past the switch and moving very slowly—less than two miles an hour—he looked out the side window and saw Eckenrode on the siding opposite the cab, walking along in the direction in which the train was moving and 10 or 12 feet away and 3 or 4 feet below. Eckenrode made a joking remark about getting a crowbar to help push the train up the hill and Sunderlin answered in kind. After that, he did not see Eckenrode again until he looked out of the [fol. 151] window about three car lengths farther on and saw his body lying on the embankment to the right of the

track about 5 feet from the front part of the engine, head toward the engine and feet down the embankment.

The plaintiff's theory of the manner in which Eckenrode met his death was that in attempting to put extra sand on the track in front of the driving wheels his head had been struck by a part known as the lap and lead lever—a bar which moves forward and backward on the outside of the front drivers, very slowly when the wheels are doing their duty but very rapidly when they slip and revolve at high speed. There was evidence to support this theory in that another brakeman saw Eckenrode, after he had walked about a hundred feet along the siding, pick something up from the ground and start diagonally up the embankment toward the main track, holding his two closed hands out in front of him.

Marks on the lap and lead lever and the cylinder head show that in some manner Eckenrode's head was between the two when it was struck. How it came to be there does not appear. Looking at the photograph of the parts of the engine involved, one would scarcely wish to hazard a guess as to what occurred. Eckenrode may have merely misjudged his distance, when he attempted to spread his handful of sand on the track, or he may have deliberately leaned over to examine the sand pipe where it came down to the track, taking the chance that he could draw back before the wheels slipped again. Or, having placed his head in dangerous proximity to the moving lever or walking along dangerously close to it, he may have slipped or stumbled. The possibility (if there was any such possibility) that the accident happened entirely without negligence on his part is eliminated by the jury's finding that his negligence contributed to the accident.

In answer to the interrogatory submitted by the Court, the jury found that Sunderlin was negligent "in not seeing [fol. 152] Eckenrode after their conversation" and, on this basis alone,* found a verdict for the plaintiff.

---

* The plaintiff's suggestion that each momentary pause of the train when the wheels slipped terminated a movement and that a bell should have been rung and a whistle blown, each time they took hold again, is without merit. There was only one continuous train movement and proper warning was given at its inception.

The basis of liability under the Federal Employers' Liability Act is negligence and, in spite of the observation of the Court in Griswold v. Gardner, 155 Fed. 2nd 333, 334, that "it is difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict", it is still the duty of the Court to determine whether the plaintiff has produced any evidence of negligence on the part of the defendant and, if not, to direct a verdict. See Brady v. Southern Railway Co., 320 U. S. 476.

The definition of negligence under the Employers' Liability Act as stated by the Supreme Court differs in nowise from its definition under the general law, except possibly for added emphasis upon the accepted corollary that the standard of care must be commensurate with the dangers of the business. In Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54, 67, he Court said, "* * * The employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done."

The Tiller case made it plain that under the Statute every phase of the doctrine of assumption of risk is completely eliminated, and it must not enter into the Court's consideration either as a defense or, upon the issue of negligence, as an element in determining the measure of the employer's duty of care to the injured employee. The practical effect of the Tiller decision upon the present case is that, for the purpose of determining what duty of care Sunderlin owed [fol. 153] to Eckenrode, the latter must be treated as though he were a non-employee in a position in which he had a right to be. However, while the fact that he was an employee in no way reduced the duty of care which the defendant owed him, neither did it increase it, and the Court need not ignore the fact that the deceased was not a child or an infirm or incompetent person but a man of mature years in full possession of all his faculties and entirely familiar with the danger involved in getting too close to a moving locomotive.

I do not think that an engineer, engaged in operating a slowly moving locomotive, in broad daylight, is bound to keep a man walking along beside the cab 10 to 15 feet away

under continuous observation, or that his not doing so is negligence.

Sunderlin could see that Eckenrode, as he walked along the siding, was not in a situation which was even potentially dangerous and he knew that there was nothing in Eckenrode's duties which would require him to board the train or even to come close to it until after the waiting cars had been coupled and the movement ended. That coupling would be made by the other brakeman and Eckenrode, who had nothing to do with it, could properly have ridden in the caboose. The plaintiff's suggestion that Eckenrode's joking remark that he would get a crowbar and push the train up the hill should have indicated to Sunderlin that he intended to assist the train cannot be seriously considered.

The locomotive was laboring and the wheels slipped six or eight times from the time the train started until the accident happened. Each time they slipped it was necessary to close the throttle promptly and then open it up again to the fullest extent. This required the engineer to give somewhat more attention to his throttle than would be the case in an ordinary movement. Assuming a speed of two miles an hour, he could not have had his eyes off Eckenrode for much more than a minute.

[fol. 154] On Sunderlin's side of the cab there were two windows, one a small one in front, rather high up, and the other the large side window. If he had looked out the latter he could have seen Eckenrode up to a point two or three feet to the right of the front of the engine but not closer, unless he had leaned far out. Whether he could have looked or did look out of the front window as he proceeded—a matter as to which there was a conflict of testimony—is of very little moment in view of the fact that the side window gave him a much better view * along the track and, concededly, he did not look out of the side window. The matter of the front window might have been important if the injury had been to a brakeman on the track or on the cars but the

* The photograph of the engine shows very clearly that, looking from the small front window, the foot walk along the side of the boiler would have cut off the engineer's view along the track at a considerably greater distance than from the side window.

question here is negligence with respect to a man walking along at a safe distance beside the engine, with no reason to be on the train or to come close to it. "Actionable negligence is negligence to the particular person who has been injured. * * * The decisions are substantially unanimous to the effect that it is not sufficient to show that the defendant owed to another person or class of persons a duty which, had it been performed, would have prevented the injury of which complaint is made by the plaintiff", American Jurisprudence, Negligence, Paragraph 18.

The plaintiff contends that if Sunderlin had kept a continuous watch upon Eckenrode he would have seen him pick up sand and approach the engine. Undoubtedly he would, but even so, it can hardly be argued that it would have been incumbent upon him to stop the train movement at that point, and it would have been absurd for him to have warned Eckenrode that the train was moving and that the wheels were slipping from time to time, or to have explained to him that it would be dangerous for him to get his head too close to the driving wheels. Negligence can [fol. 155] never be established merely by showing that had the actor acted otherwise no accident would have happened. On such a theory it would be negligence to have started the train at all.

The question of causation, under the facts of this case, is rather closely tied in with that of the defendant's negligence and it has, at least partially, been covered by what has been said. If, with Eckenrode under observation from the cab window, and with the engineer exercising all reasonable care, the accident still would not have been avoided, the engineer's failure to look, negligent or otherwise, cannot have been its proximate cause. The jury, answering another interrogatory, found that there was something "which a reasonably careful man, in Sunderlin's position, could have done which would have avoided the accident" had he been watching Eckenrode, but I think that the evidence was insufficient to support that finding.

In Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 32, the Supreme Court considered the whole question of the sufficiency of evidence to establish causation. The Court started with the proposition that the "Petitioner was required to present probative facts from which the negli-

gence and the causal relation could reasonably be inferred." And went on to say, " 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inference favoring the party whose case is attacked.' "

The structure of the locomotive as shown by the photograph makes it plain that Eckenrode must have been extremely close to the engine in order to get his head into the position where it was crushed. Assuming that Sunderlin had seen him approach the train with sand in his hands, he would not have seen him nearer the locomotive than two or three feet and it would be mere speculation to say that there was anything which Sunderlin could have done at that point, short of stopping the train, which would have [fol. 156] prevented the accident. Where a necessary link in the chain of cause and effect is the actor's failure to take some subsequent action, wholly uncalled for under the circumstances and not required of a reasonably careful man, it cannot be said that the original act is the proximate cause of the accident.

The defendant's motion for judgment is granted.

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT IN FAVOR OF DEFENDANT—Filed January 7, 1947

Before Kirkpatrick, J.

And now, to wit: January 7th, 1947, in accordance with the opinion of the Court, it is ordered that the verdict and the judgment entered thereon in favor of the Plaintiff, Julia Eckenrode, Administratrix of the Estate of John Henry Eckenrode, deceased, and against the defendant, Pennsylvania Railroad Company, in the total sum of Ten Thousand and 00/100 ($10,000.00) Dollars; be and the same is hereby set aside.

It is further ordered that Judgment be and hereby is entered in favor of Defendant, Pennsylvania Railroad Company and against the plaintiff, Julia Eckenrode, Admin-

istratrix of the Estate of John Henry Eckenrode, deceased, with costs.

By the Court.

Attest:

(c) Gilbert W. Ludwig, Deputy Clerk.

[fol. 157] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

Notice is hereby given that Julia Eckenrode, Administratrix of the Estate of John Henry Eckenrode, Deceased, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Third Circuit from the judgment of the United States District Court for the Eastern District of Pennsylvania, on January 7, 1947, vacating judgment entered in favor of plaintiff and entering judgment in favor of defendant with costs.

(S.) B. Nathaniel Richter, of Richter, Lord & Farage, Counsel for Plaintiff.

IN UNITED STATES DISTRICT COURT

AMENDED DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Honorable, the Judges of said Court:

Julia Eckenrode, Administratrix of the Estate of John Henry Eckenrode, Deceased, appellant, herewith designates the following portions of the record to be contained in the record on appeal in the above entitled action:

1. Docket Entries.
2. Complaint.
3. Answer.

[fol. 158] 4. Testimony, including all exhibits, points for charge, Court's charge, interrogatories to the jury, and the jury's answer thereto.

5. Judgment in favor of Plaintiff.

6. Defendant's Motion for Directed Verdict under Rule 50.

7. Defendant's Motion to Set Aside Verdict and Judgment in accordance with Defendant's Motion for Directed Verdict under Rule 50.

8. Order of the Court staying execution pending motion for judgment n. o. v.

9. Opinion of the Court dated January 7, 1947 Sur Defendant's Motion for Judgment.

10. Order of the Court vacating judgment entered in favor of Plaintiff and entering judgment in favor of Defendant, with costs.

11. Notice of Appeal.

12. This Amended Designation.

Richter, Lord & Farage, by (S.) B. Nathaniel Richter, Counsel for Plaintiff.

[fol. 159] In United States Circuit Court of Appeals

Appendix for Appellee

In United States District Court

Charge of the Court

Kirkpatrick, *J.*

Members of the jury, in this case the plaintiff, the widow of John Henry Eckenrode, who was killed while a brakeman on the railroad on October 8, 1943, is asking damages for the death of her husband.

I should say at the outset that the mere fact that her husband was killed while he was an employee of the Railroad Company is not sufficient to give her damages in this case. There is no Federal Workmen's Compensation Act which allows compensation for every injury or death which occurs in the course of employment, such as there is in many of the states and in our state. Under the Federal Law she must show in order to recover damages that the defendant has been at fault in some way and it is negligence or failure to comply with an Act of Congress which makes the defendant liable, and nothing else. Unless you find that there was such negligence on the part of its employees, or failure on its part to comply with the law, then you would have to

find a verdict for the defendant. You could not find a verdict for the plaintiff merely because her husband was killed while he was an employee.

Let us see now where she charges that the defendant here is at fault in causing the death of her husband. There are two Acts of Congress involved. She has brought this suit under both acts. One is called the Employers' Liability Act, I will read you what that is, and then we will apply it to the facts of the case. The Employers' Liability Act says, in substance:

> Every common carrier by railroad shall be liable in damages, in case of death of any employee, to his personal representative, for the benefit of such employee's, in this case, wife and child, for injury or death result-[fol. 160] ing in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

In other words, if you find in this case that Eckenrode was killed as a result of the negligence of Sunderlin, the man who was running the engine, or of any other employee, then you would find a verdict for the plaintiff under the rules that I am going to give you, provided you find that such negligence was the cause of the accident, but you must find under the Employers' Liability Act that there was negligence on the part of somebody.

"Negligence" means want of care; just want of reasonable care under all the circumstances of the case—failing to do something that reasonably careful, prudent men would do, or doing something that reasonably careful, prudent men would not do. That is what "negligence" means, and the burden of proof all through the case is upon the plaintiff to satisfy you that she has a cause of action and to satisfy you of that by the fair weight of the evidence.

That is the Employers' Liability Act.

Then there is also what is called the Boiler Inspection Act, and I will read you the section of that which the plaintiff says the defendant has violated, and thereby given her this cause of action:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to

operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb. . . ."

That is the essential part of that. The cause of action under that Act does not depend on negligence; that depends on the failure to comply with the statute. So that, even if you found that there was no negligence on the part [fol. 161] of any of these employees, if you find that this engine was defective or did not meet the requirements of that Act, then you would bring in a verdict for the plaintiff. If on the other hand you find that the engine met the requirements of the Act, that it was proper in all respects, that all parts and appurtenances thereof were in proper condition and safe to operate in the service to which it was put, and if you also find that there was no negligence on the part of any employee, then you would have to find for the defendant.

I am going to take these charges that she makes of fault or failure to comply with the law, and I will take first the Boiler Inspection Act.

The plaintiff specifically points out what is known as the sander on the engine. I do not mean to go into all the testimony. You understand that, whatever I say about the testimony in the case, the facts are for you to decide. I merely instruct you as to the law and you determine what the facts are. If your recollection does not go along with mine you can disregard what I say about the facts and follow your own recollection. The law you take from me.

The question of the failure of the engine to be in proper working condition centers largely around the question of this sander. I think it is proper to say to you that it does not make any difference what the condition of the sander was earlier in the day. It does not make any difference if it was clogged up twenty minutes before the accident when the engine was down on the Hastings Fuel Siding. The important question there is whether that sander was working properly at or shortly before the time of the accident, because if it was working properly and was in proper shape then, it was not defective under the Boiler Inspection Act. Of course, the fact that there was a defect or that the sander did clog up is evidence in the case and you can consider it as bearing on the question of what the state of the apparatus was at the time the accident happened, but you address

yourself directly to the question of whether that sander [fol. 162] was operating at the time the accident happened or immediately before, because if it was defective and had been fixed, if there was anything wrong with it which had been put right, why, then that defect could not have caused the accident.

Of course, the plaintiff's suggestion is that the way the accident happened—at least one suggestion—was that the sander was not working properly, that the wheels would not have slipped as they did if it had been, that Eckenrode for some reason, either voluntarily or because he slipped or fell, got in a position where his head was right in front of that revolving rod, that just as he got into that position the wheels slipped because the track was not properly sanded, and that the engine rod shot around at a high rate of speed, revolving very rapidly, and killed him. That is one of the theories of the accident which the plaintiff has suggested to you. If that is what happened, then you could find that the accident was the result of a defective piece of equipment in connection with the locomotive. Consider all the evidence on that point.

It is important to note that all of the witnesses called testified to the extent of their knowledge that the clogging up of the sander had been remedied and that so far as they knew the sander was working all right, and they verified that after the accident by looking along the rails of the track and seeing that the sand had been evenly distributed all the way down to the point where the engine started to push these cars up the grade. Of course, if that was so, that is the strongest kind of evidence that the sander had been put in proper working order and was working at the time of the accident.

Then the plaintiff says that, apart from any question of the sander, the mere fact that the engine slipped from time to time as it was pushing these cars up this grade—six or eight times as Mr. Sunderlin testified—is evidence from which you can infer that there was something wrong [fol. 163] with the engine regardless of the sander and even assuming the sander was working right. You have to remember all the testimony in the case. Have the defendant's employees who testified said that it was not an unusual thing for the engine wheels to slip? While Sunderlin did not remember any particular case in which there were twenty-two cars, he did remember cases where with twenty-four

and twenty-eight cars the engine wheels had slipped even though the sander was working properly and there was nothing wrong with it. I am going to permit you to discuss that question among yourselves and make a finding on it—whether you think that there is sufficient evidence here, apart from any question of the sander, drawing it from the fact that the engine slipped, that there was something wrong with the engine.

I am going to submit what we call interrogatories. They are just questions to which you will write answers, and they are right in line with what I am charging you. I do not think you will have any trouble answering them. For example, the question is:

> "Was the sander working properly at or immediately before the time of accident?"

That asks just what I have been asking you to say.

The next question is:

> "Apart from any question about the sander did the engine fail to meet with the requirements of the Boiler Inspection Act in any other particular?"

That simply means, was it or was it not in proper condition and safe to operate in the service to which it was put?

That is the case under the Boiler Inspection Act.

Then we come to the case under the Employers' Liability Act, and that comes down pretty much to the alleged negligence of Sunderlin, and that, according to the plaintiff's case, lay in failing to observe Eckenrode at all times after he had the conversation with him standing there be- [fol. 164] side the cab. You must ask yourselves whether that was in any degree a negligent act, and then you must also ask yourselves (if it was negligence) whether there was anything which he could have done to have avoided the accident even if he had seen and had watched, because if there was nothing he could have done to avoid the accident had he seen Eckenrode, then his failure to see him would not be the cause of the accident, of course.

You remember that when he talked to him Eckenrode was walking, not on a parallel track, but a slightly diverging track about twelve feet away and something like four or five feet below the track on which the engine was going. When a man is operating an engine, the question is, do you

think he is bound to keep his eye at all times on somebody who is walking alongside the engine at a distance of twelve feet, we will say, on a lower level? Is it want of care or prudence if he takes his eye off that person and does not look at him any more, but concentrates on the operation of the engine in pushing the cars up the siding? He could have seen Eckenrode—there is no question about that—if he had leaned out of the cab or put his head out of the side window of the cab and followed him with his eye. He could have seen him all the time. Is that a requirement of due care? Should an engineer do that? We all know that people walk alongside of tracks. Are you bound to anticipate that something will happen to them which will throw them under the engine or that they will place themselves in a position where they are going to be hit by the engine? That is a question for you. I am going to leave that entirely to you. Is it carelessness for a man driving an engine not to keep his eye on a man, walking beside his cab at the distance at which Eckenrode was walking?

That is the third question that I am asking you:

"Was Sunderlin negligent in not seeing Eckenrode after their conversation?"

[fol. 165] The fourth question is:

"Was there anything which a reasonably careful man in Sunderlin's position should have done which would have avoided the accident even if he had been watching Eckenrode to the best of his ability?"

The question you will have to determine is, what could have been done if Eckenrode suddenly slipped and fell? Would it have been possible to stop the engine? Would it have been possible to take any different course of conduct or action from that which Sunderlin did? Of course, if Sunderlin had seen that Eckenrode was proceeding to stoop down and put his head in a position where it would be hit, why, he probably could have avoided it by turning off the steam and stopping the engine but if it was a sudden slip or fall and he slid under the engine unexpectedly it is questionable. It is for you to say, but it is questionable, whether there is anything he could have done about it even if he saw it.

If you find that the sander was not working properly, or if there was any other defect in the engine, or if Sunder-

lin was negligent in any particular, then your verdict should be for the plaintiff. If you find, on the other hand, that the sander was all right, that the engine was all right, and that Sunderlin was not guilty of any negligence, then you would find for the defendant and that would end the case at this point.

Now I will go on and charge you as to what you must do if you find a verdict for the plaintiff. That does not mean that I think you should find a verdict for the plaintiff. I am not expressing any opinion one way or the other. It is entirely for you to find. If you find for the defendant, you can stop right there at the end of question No. 4, but if you find for the plaintiff on any of those points, then you can go on and ask yourselves whether there was any negligence on the part of Eckenrode himself which caused or contributed to the accident.

[fol. 166] The defense of contributory negligence in a case of this kind is not an absolute one, as I will explain, but you must determine how much of this accident was caused by Eckenrode's negligence, if he was negligent. We do not exactly know what he was doing, but he is presumed to have used due care. We do know that he had a handful of sand, or he had something in his hand which I think we can infer was a couple of handfuls of wet sand, and we do know that he had been joking with Sunderlin about giving him help and pushing the engine. We do know that it is possible that he was, either seriously or in joke, trying to put this whatever he had in his hand on the rail and it is for you to say, if that is what happened, whether it was negligence on his part. On the other hand there may have been no negligence of any kind, he may have simply slipped and fallen or stumbled and fallen under the railroad train, but you must answer that question, whether he was guilty of any negligence.

If you find for the plaintiff all along in the way that I have explained to you, you come to the question of damages. If you find for the defendant you do not have to determine damages.

We now have a word to say about what the damages are. Mr. Eckenrode was in good health, he was a man sixty-two years old and you heard the testimony as to his earnings. During the year 1942 he earned $2,432. In 1943 there was an increase and in 1946 there was an increase, so that

if he had lived, kept his job, been in good health, and was still working today he would have added to that about $680, making it something like $3,100 a year in the normal course, provided he kept his employment.

The general rule is this, that the plaintiff is entitled to recover the pecuniary loss which she suffered by the death of her husband. The loss in such case is what the deceased would probably have earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime and what would have gone for the benefit of his [fol. 167] widow, taking into consideration his age, ability, and disposition to labor, and his habit of living and expenditure. Under this rule it is the duty of the jury to ascertain the earning power of the deceased at the time of his death. That is what you are supposed to determine.

Then the plaintiff is asking me to say, and I will so charge you, that you are entitled to add to that such sum as you believe truly expresses the monetary value of the parental guidance, care, understanding and physical attention that you believe the deceased would have rendered to his invalid daughter who was a mental incompetent from the date of his death to the present time, and you will add that sum to the sum already arrived at.

That would simply cover the two or three years from the date of his death to the present time on that particular, but when you come to the question of his earning power you have to consider more than just the period between his death and the present time. You have to consider the whole of his life.

The testimony is that according to experience tables of insurance companies he would have had thirteen years to live at the age of sixty-two. That is not any absolute figure that you have to accept. You can use your own judgment and experience in determining the normal expectancy of a man of good health and steady habits living the kind of life that Mr. Eckenrode lived. As I say, you can find it more or you can find it less than the thirteen years, and you are not bound to give any great or exceptional weight to the insurance figure.

That does not end the thing though, because you can see very easily that it would not be fair to say, well, Mr. Eckenrode would have lived, for the purpose of example, let us say ten years to make the figures even, and he was earning $3,000 a year and therefore we will allow him $30,000 for

the loss of his earning power. That would not be fair because even if he had lived Mrs. Eckenrode would not have gotten it all at once. She would have gotten it in [fol. 168] instalments and everybody knows that it is much more desirable to have something all at once than to have it spread over a period of ten years or so. In other words, if you were selling your house to me and I agreed to pay you $30,000 for it at the rate of $3,000 a year for the next ten years, and then I would come to you tomorrow and say: I would like to pay this whole thing, you might be very willing to accept less than $30,000 to get the money now. You might say $25,000 or $20,000, or whatever it might be that you think the present worth of those instalment payments is. So that you have to reduce it (and that is just an illustration, it is not binding on you) but everybody knows that instalment payments spread over a period of years have a value which is less than the sum of all those instalments. To have money paid over a period of years in instalments is always less valuable and less desirable than to have it in a lump sum. You have to take that into consideration and you have to reduce the earnings of this deceased husband so that you find out what the present worth of those earnings is. What is the present worth of his earning power?

Then there is another thing you have to consider and that is that he was getting along in years. He was not a very young man, and a man engaged in physical work of that kind—brakeman on a railroad—it is common experience and you can take it into consideration that his earning power is very likely to diminish toward the end of his life. It may disappear altogether and he may live a long time without any earning power. It is not likely in an occupation such as he had that it will increase very much. It may increase somewhat. There may be further increases in wages and there may be a pension to consider but of course a pension is never anything like the amount of his earnings. You have to take that fact into consideration in figuring a lump sum which will compensate the widow now for the loss of her husband.

You see, I am asking you these things just as I have them here, and I am asking you:

[fol. 169] "What was the total pecuniary loss suffered by Mrs. Eckenrode as a result of her husband's death?"

You have to consider all those things I have stated and then give some figure that will compensate her. Remember that she receives it now instead of over a period of years. You will find that figure and then put it down as your answer to that question.

Then comes this other question: If you have found that Eckenrode himself was negligent or contributed in any way to the accident the law says that you diminish the verdict by the amount that you think his negligence contributed to the accident. In other words, if you would say to yourself: Well, this accident was half and half, it was half the fault of the Railroad Company and half the fault of Eckenrode himself, then you would have to take only one-half of the amount that you find that the widow has lost, and that is all she would be entitled to.

If you say: Well, Eckenrode was somewhat negligent, say twenty-five per cent of the cause of the accident was his negligence and seventy-five per cent was the Railroad Company's negligence, then you reduce the verdict by twenty-five per cent, and so on.

I have asked you therefore, No. 10:

> "By what sum do you diminish the damages by reason of Eckenrode's negligence, if any?"

Of course, if you find that he was not negligent you do not diminish the damages at all.

Now, going back again, bear in mind if you will that all my charging on damages is not an indication that you must find for the plaintiff or that I think you should find for the plaintiff. I think that is entirely for you to say, and if you find for the defendant, then you have nothing to do with damages at all.

I have a lot of points for charge and I am wondering if counsel will tell me how many of these they want me to charge the jury on.

[fol. 170] The plaintiff first. What do you want me to charge on?

Mr. Richter: I would like Your Honor to charge No. 2 exactly as given.

The Court: All right.

> "2. The Safety Appliance Act imposes upon the railroad an absolute and continuing duty to maintain

the locomotive and all parts and appurtenances thereof in proper and safe condition and safe to operate in active service without unnecessary peril to life or limb."

Now, what else would you like me to say here? I will charge on any of these points you want. I have covered a good many of them.

Mr. Richter: Point 7. Will Your Honor read point 7?
The Court: That is right.

"7. There is no duty on the plaintiff to prove the precise defect that caused the sander to fail to function properly. It is sufficient if you find that, in fact, upon attempted use, it failed to perform its normal and proper function, and that by reason thereof, the decedent suffered fatal injury."

I will charge to that extent.
Mr. Richter: Thank you.
The Court: You know what that means, that if you find the sander did not work, you do not need to find out exactly why it was not working.
Mr. Richter: Will you charge No. 8?
The Court: I think I have covered that. I would rather let that stand the way I have given my charge.
Mr. Richter: All right, sir.
The Court: I will not affirm that as stated.
[fol. 171] Mr. Richter: Will Your Honor charge No. 9?
The Court: That is all right.

"9. A railroad employee does not assume any of the risks of his employment"——

That is right. It is a dangerous employment and he is not held to have assumed the dangers that are incident to that employment.

—"and if you find that the decedent was injured while attempting to assist a non-functioning sander by spreading sand under the wheels and in the performance thereof, he suffered fatal injury"—yes—"then your verdict must be for the plaintiff."

That is the Boiler Inspection Act.

Mr. Richter: Will Your Honor charge No. 14?

The Court: 14?

Mr. Richter: Yes.

The Court; No, that is a question for the jury.

Mr. Richter: All right, sir.

The Court:: I cannot put it the way you have asked me to and I will deny that.

Mr. Richter: All right, sir.

The Court: I will leave it to the jury to say whether his failure to look out the side window was or was not negligent.

Mr. Richter: Of course, 18 is the formal, usual point, which I presume Your Honor will refuse.

The Court: Yes. Mr. Rhoads, what do you want?

Mr. Rhoads: If Your Honor please, I assume Your Honor will grant me an exception to your affirmance of 8——

The Court: I will grant you an exception to the affirmance of all the plaintiff's points.

[fol. 172] Mr. Rhoads: Will Your Honor charge on No. 9?

The Court: Yes. The burden is on the plaintiff—I told you that—to prove not only a violation of the Safety Appliance Act in that branch of the case, but also that such violation was the cause of the accident. In other words, if the engine had a defective whistle, let us take that, or if there was something the matter with the coal feeder, or the engine, or something of that sort, and it had nothing to do with the accident, it would not make the defendant liable. If you find anything wrong with the engine you must also find, in order to hold the defendant, that whatever was wrong was the cause of the accident.

Mr. Rhoads: Will Your Honor charge on 14?

The Court: Oh, yes. I am glad you called my attention to it. I neglected to say that.

> When you come to the question of damages, "In calculating the amount which the deceased might reasonably have been expected to contribute to his surviving widow and children you may take into consideration the fact that some portion of any amount which he contributed necessarily was applied to his own maintenance for food and shelter."

Now, you have to take off that another figure, and that is what he kept for himself, because his wife did not get that. She testified he kept eight or ten dollars a month, and in addition to that bought his own clothes out of the money that she got. So that there would be a sum there that you would have to take off because it is only what she would get of his earnings and not what they both used.

Mr. Rhoads: If Your Honor please, in view of Your Honor's charge as to the monetary value for paternal guidance, I assume that Your Honor would refuse to charge on my point No. 13. 13 is mine, which is contrary to that.

Will you grant me an exception to that portion of your charge?

[fol. 173] The Court: Yes, I will deny 13.

Mr. Rhoads: If Your Honor please, those are the only points, but there is one other thing.

The Court: I was going to ask you both, if there is anything further that you want me to say, or anything I have omitted, or anything that you think I have stated incorrectly, I would like to have my attention called to it now, so that it can be straightened out if it has to be.

Mr. Rhoads: If Your Honor please, in that portion of Your Honor's charge where you referred to, I think, the second interrogatory, and the mere fact that the engine was slipping——

The Court: Yes. I will allow you an exception to that.

Mr. Rhoads: Would Your Honor charge that, when you were discussing the possible negligence of Eckenrode, you referred to joking, and the possibility of stumbling or falling, you did not mention the possibility that it might have been negligence for him to have been upon that bank with an engine moving.

The Court: I think you can consider that whole thing. I think you can consider whether he was guilty of negligence in walking so close to a moving engine that even a stumble might have put him under the wheels.

Is there anything else for you, Mr. Richter?

Mr. Richter: Nothing else.

The Court: I will try to give you gentlemen copies of these interrogatories.

The Clerk: Are there any exhibits to go out?

Mr. Richter: Yes.

The Court: I may want you to stipulate after I leave that the clerk can take the verdict in my absence.

Mr. Rhoads: We can agree to that, Your Honor.

Mr. Richter: Yes.

[fol. 174] The Court: You both agree to that.

It is stipulated that in the event the jury returns in the absence of the Court the clerk may take the verdict, and also in the absence of counsel.

(The jury retired at 2:30 P.M.)

(The plaintiff submitted the following Points for Charge:

PLAINTIFF'S POINTS FOR CHARGE

The Learned Trial Judge is respectfully requested to charge the jury as follows:

1. The Boiler Inspection Act, which is otherwise known as 45 U. S. C. A. Sec. 23, requires the railroad to provide an engine free of any defective equipment or appurtenances which may subject employees to unnecessary peril to life or limb; the sanders on the engine are appurtenances within the meaning of this Act.

2. The Safety Appliance Act imposes upon the railroad an absolute and continuing duty to maintain the locomotive and all parts and appurtenances thereof in proper and safe condition and safe to operate in active service without necessary peril to life or limb.

3. If you find that the sanders did not work properly on this engine and that as a result thereof, the decedent was fatally injured, then your verdict must be for the plaintiff regardless of whether you decide that it was due to a defect in the sander or that the sand was damp or had other foreign substances in it which prevented the smooth, even flow to the track upon operation.

4. If you find that the deceased had stopped to pick up wet sand and was carrying it to the engine for the purpose of assisting in supplying traction for the engine because the sanders were not operating properly and efficiently and [fol. 175] that thereby the plaintiff's decedent was injured, your verdict must be for the plaintiff.

5. Even if you believe that the plaintiff's decedent was himself negligent in undertaking to place sand under the

wheels, if you believe that he did so because sand was not flowing smoothly or adequately to the tracks below, then you must find for the plaintiff in the full amount without any diminution for contributory negligence because contributory negligence on the part of the decedent is no defense under the Boiler Inspection Act as that law places absolute and full responsibility upon the railroad for injury or death sustained by reason of any violation thereof.

6. This Act places upon the railroad an absolute duty of supplying sanders that continuously, without cessation, perform the function for which they are placed upon the engine, and if you find that this sander failed to function properly, evenly and adequately, then your verdict must be for the plaintiff, even though you find that the railroad had inspected this engine before it moved out on to the track or that it was inspected even a minute before the accident, as no excuse is available to the railroad for any defect in one of these safety appliances.

7. There is no duty on the plaintiff to prove the precise defect that cause the sander to fail to function properly. It is sufficient if you find that, in fact, upon attempted use, it failed to perform its normal and proper function, and that by reason thereof, the decedent suffered fatal injury. In that case your verdict must be for the plaintiff.

8. It is no defense for the railroad that the sander functioned properly at some time prior to the accident or that it functioned properly after the accident. If you find that it failed to function properly at any time and that by reason thereof the plaintiff's decedent suffered fatal injury, your verdict must be for the plaintiff.

[fol. 176] 9. A railroad employee does not assume any of the risks of his employment, and if you find that the decedent was injured while attempting to assist a non-functioning sander by spreading sand under the wheels and in the performance thereof, he suffered fatal injury, then your verdict must be for the plaintiff.

10. Under the Federal Employers' Liability Act, the railroad is held responsible for the carelessness of any fellow employee of the decedent which was, in whole or in part, a cause of the fatal injury received by the decedent. If you find that the engineer could have, and should have, seen

the decedent before giving the engine the throttle that caused the rod on the engine to move and strike the deceased and did so without warning the deceased of his intended move, and that by reason thereof the deceased was fatally injured, your verdict must be for the plaintiff.

11. It is the duty of every employee to perform his work in such manner as to avoid any unreasonable risk of harm to others. If you find that had the engineer properly observed the conditions surrounding the engine immediately before he gave it the throttle move that resulted in the fatal injury sustained by the decedent, this accident would not have occurred, then your verdict must be for the plaintiff.

12. It is the duty of all employees to assure themselves that a proposed move will not subject other employees to an unreasonable risk of harm. If you find that the engineer should have looked out of the side window to make sure that no one was near the engine who might be injured by any move which he, the engineer, took, and that by reason of his failure so to look, the decedent suffered fatal injury, then you may find such conduct negligence, and your verdict would be for the plaintiff.

13. There was evidence in this case that the engineer is obliged to maintain a lookout ahead while operating an engine. It is no excuse for anyone to say that he did not see [fol. 177] that which, if he had looked, he would have seen. If you find that in this case the engineer could have seen the deceased had he properly looked ahead, then you may decide from his statement that he did not see the deceased, that he was not looking ahead when he attempted to move the engine and took the step that resulted in fatal injury to the decedent. The failure of the engineer to look would be negligence, and if you find that that failure caused this fatal injury then your verdict would be for the plaintiff.

14. If under all the circumstances, you believe that the only way that the engineer could get a clear view would be by looking out of the side window, then his failure to do so would be negligence, and if by reason thereof the decedent suffered his fatal injury, then your verdict would be for the plaintiff.

15. If you decide that the plaintiff is entitled to a verdict by reason of a violation of the Boiler Inspection Act which

requires the sanders to be in such condition as to prevent injury to life or limb of the railroad employees, then you will disregard anything I have said in regard to any contributory negligence on the part of the decedent in relation to the Federal Employers' Liability Act which might be used toward mitigating the damage and you will give her a full verdict under the Safety Appliance Law as contributory negligence is not a defense to a violation of the Safety Appliance Law, or, as it is known, the Boiler Inspection Act, in this case.

16. If your verdict is for the plaintiff, under the Boiler Inspection Act, you will first determine how much, in dollars and cents, the plaintiffs have lost to date in the way of lost earnings which the deceased would have earned and contributed from October 8, 1943 to the present time. You will add to that sum the sum that you believe the deceased would have continued to have contributed through the natural course of his life, had he not met with this fatal injury. In [fol. 178] determining that sum, you will consider the expectancy of life, his habits of living, the condition of his health, and the security of his position, taking into consideration, of course, the strong seniority that he, as all railroaders, had by reason of his long employment and the established rates of their pay. You will also consider how much the deceased would have earned from the date of his death up to the present time and into the future by reason of pay increases that have accrued to the benefit of railroad employees since the date of his death. Having arrived at a total sum that you believe that the plaintiffs would have received from the decedent during the natural course of his life had he not met with this fatal injury, you will calculate the present value thereof and you will add that sum to the amount that you believe they have already lost from the date of the accident up to now. You will add thereto such sum as you believe truly expresses the monetary value of the paternal guidance, care, understanding and physical attention that you believe the deceased would have rendered to his invalid daughter who is a mental incompetent from the date of his death to the present time and you will add that sum to the sum already arrived at. You will then add thereto the present value of such services as you believe the deceased would have rendered to this girl in the future and add that sum to the sum already arrived at. You will total all of

these figures and render your verdict in a single amount which, of course, must be unanimous.

17. If you decide against the plaintiff on the Boiler Inspection Act, but you decide for the plaintiff under the Federal Employers' Liability Act, then and then only you will consider the question of whether or not the plaintiff's decedent was guilty of any contributory negligence. If any at all, you will determine to what degree his own negligence contributed to his injury and you will reduce the amount of your verdict arrived at, as previously outlined under the [fol. 179] Boiler Inspection Act, by such amount as you think his own negligence was a factor in producing his death, and then you will bring in your verdict for the plaintiff in the reduced amount. You will, however, before you arrive at any question of contributory negligence on the part of the plaintiff's decedent under either of these acts, remember that you begin consideration of the case with the presumption that the deceased used all due care for his safety and that the burden is on the defendant to establish by a preponderance of the evidence that the decedent was guilty of any contributory negligence. Furthermore, not only must the defendant prove that the plaintiff's decedent was guilty of some contributory negligence before you can reduce the size of this verdict, but, in addition, you must remember that the defendant bears the burden of establishing by a preponderance of the evidence that such contributory negligence was a proximate cause of the decedent's fatal injury. Unless the defendant meets both of these requirements, you cannot find the decedent guilty of any contributory negligence, and your verdict would be for the plaintiff in the full amount.

18. Under all the evidence, your verdict must be for the plaintiff against the defendant.

Respectfully submitted, (Signed) B. Nathaniel Richter, Attorney for Plaintiff.")

[fol. 180] (The Defendant submitted the following Points for Charge:

DEFENDANT'S POINTS FOR CHARGE

1. The right of action under the Federal Employers' Liability Act is a statutory right and exists only in favor of those designated by the Act.

2. The right of action under the Federal Employers' Liability Act is a statutory right and in the case of an injury resulting in death, such right is in the personal representative of the deceased employee only and if you find that the Plaintiff was not at the time of the commencement of the action the duly appointed personal representative of the deceased your verdict must be for the Defendant.

3. Under the Federal Employers' Liability Act the Plaintiff has a right of action only if his damage was caused by some negligence of the railroad company and, therefore, unless you find that the railroad company was negligent and that such negligence contributed to or caused the Plaintiff's damage, your verdict must be for the Defendant railroad company.

4. Under the Federal Employers' Liability Act the Plaintiff has the burden of proving the Defendant's negligence by a fair preponderance of the evidence. If therefore you find that the weight of the evidence is against the Defendant's negligence, or if you find that the evidence on the subject of negligence is equally balanced, in either of those cases your verdict must be for the Defendant railroad company.

5. If you find that the evidence in the case and the reasonable inferences to be drawn from the evidence lead with equal force to two or more causes for the accident, for only one of which the Defendant would be responsible, you may not speculate as to which one was the cause of the accident [fol. 181] and your verdict must be for the Defendant railroad company.

6. Whatever verdict you render must be based upon your honest and conscientious finding of the facts that have been proven by the evidence presented from the witness stand and you must not guess in arriving at your verdict.

7. This is a legal proceeding and you must not permit either sympathy for the Plaintiff or prejudice against the Defendant to affect your verdict in any way.

8. Where Plaintiff's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, such inference is not permissible in the face of uncontradicted testimony consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. (Penna. RR v. Chamberlain, 288 U. S. 333, 340, 341.)

9. The burden of proof is upon the Plaintiff to prove the negligence of the Defendant and mere evidence that there may have been some defect in the sanders is insufficient where the evidence is equally consistent with some other cause.

10. With respect to the Safety Appliance Acts, if you find that the sanders were working properly at the time of the accident the mere fact that they may have been less efficient at some time prior to or subsequent to the accident is not a factor, as such inefficiency could not have been the proximate cause of the accident.

11. The burden is upon the Plaintiff to prove not only a violation of the Safety Appliance Act but also that such violation was the proximate cause of the accident.

12. In considering the question of whether the Defendant railroad company was negligent you may take into consideration the general practice followed by the railroad and [fol. 182] the fact that all persons involved were railroad employees and familiar with such practice.

13. This action is brought under the Federal Employers' Liability Act and under that Act any recovery in this case is limited to the pecuniary loss actually sustained by the surviving widow and children, which would be the amount which the deceased might reasonably have been expected to contribute to such widow and children during the remaining life of the deceased but reduced to its present worth. You must not include in your verdict any amount for loss of companionship or for any sentimental loss sustained by such widow and children and you must not include anything for any loss that you may feel has been suffered by any other member of the family.

14. In calculating the amount which the deceased might reasonably have been expected to contribute to his surviving widow and children you may take into consideration the fact that some portion of any amount which he contributed necessarily was applied to his own maintenance for food and shelter.

15. In calculating the amount which the deceased might reasonably have been expected to contribute to his surviving widow and children you may take into consideration the ages of said children and whether or not they are self-supporting or capable of self-support.

16. Even if you find that some negligence of the Defendant caused or contributed to the Plaintiff's injury, if you also find that some negligence on the part of the Plaintiff likewise contributed to his injury you must first find the value of the pecuniary loss suffered by the Plaintiff and then reduce that amount by the percentage of the Plaintiff's negligence causing or contributing to the accident and then render your verdict in such amount. For example, if you should find that the railroad's negligence and the Plaintiff's negligence causing or contributing to the accident were equal, [fol. 183] your verdict must be for one half of the amount that you find the actual damage to be in accordance with the rules which I have given you.

17. The charge of the Court on the question of the measure of damages does not indicate and should not be construed by you as an indication that damages are to be awarded, but such instructions are being given because the Court is required to charge you on all possibilities and all phases of the case which you may have to consider.

Attorney for Defendant.")

[fol. 184] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9330

JULIA ECKENRODE, Admx. of the Estate of John Henry Eckenrode, Deceased, Appellant

vs.

PENNSYLVANIA RAILROAD COMPANY, Appellee

And afterwards, to wit, 8th day of May, 1947 come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Herbert F. Goodrich, Honorable Gerald McLaughlin and Honorable John J. O'Connell, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 14th day of May, 1947 come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 185] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9330

JULIA ECKENRODE, Administratrix of the Estate of John Henry Eckenrode, Deceased, Appellant,

vs.

PENNSYLVANIA RAILROAD CO.

Appeal from the Judgment of the District Court of the United States for the Eastern District of Pennsylvania

Argued May 8, 1947

Before Goodrich, McLaughlin and O'Connell, Circuit Judges

OPINION OF THE COURT—Filed May 14, 1947

PER CURIAM:

The jury in this case returned a verdict for plaintiff in a cause of action alleged under the Federal Employers' Liability Act. The District Court set the verdict aside and

entered judgment for the defendant. The basis of this action was his conclusion that there was no evidence upon which negligence on defendant's part could be predicated. We agree with this conclusion. The discussion of the fact [fol. 186] situation by the learned District Judge was thorough and complete and no object is to be served by reiteration of considerations and conclusions already satisfactorily discussed.

The judgment is affirmed.

A true Copy: Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 187] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1946

No. 9330

Julia Eckenrode, Administratrix of the Estate of John Henry Eckenrode, Deceased, Appellant,

vs.

Pennsylvania Railroad Company, Appellee

Present: Goodrich, McLaughlin and O'Connell, Circuit Judges

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed with costs.

By the Court.

Goodrich, Circuit Judge.

May 14, 1947.

Endorsements: Order Affirming Judgment, etc. Received & Filed May 14, 1947. William P. Rowland, Clerk.

[fol. 188] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1946

No. 9330

Julia Eckenrode, Administratrix of the Estate of John Henry Eckenrode, Deceased, Appellant,

vs.

Pennsylvania Railroad Company, Appellee

Order

And Now, to wit: this 26 day of May, A. D., 1947, upon consideration of the within petition, it is hereby ordered and decreed that the period of time within which the Petition for Re-Argument may be filed, be extended for ten days, or until the Ninth day of June, 1947.

Goodrich, J.

Endorsements: Order extending to 6/9/47 time for Petition for Reargument. Received & Filed May 26, 1947. William P. Rowland, Clerk.

[fols. 187-188] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REHEARING

[fol. 189] Question Originally Presented

In an action under the Federal Employers' Liability Act, where the evidence shows that an engineer was operating his engine blindly, without looking out of either of the two windows, and was intermittently closing and opening the throttle because the wheels of the engine, going upgrade, were slipping, and where, as a result of such blind driving, he failed to see an employee putting sand on the tracks and re-applied the throttle, thereby fatally striking said employee with the cylinder rod attached to a wheel, was it not error to set aside a jury verdict for the plaintiff on the ground of insufficient negligence, especially since (1) the engineer, had he looked out of the side window, admittedly could have seen deceased all the time, (2) the engineer had seen the deceased immediately before, only seven or eight feet distant, walking toward the engine, (3) the deceased had conversed with the engineer about the slipping wheels and about helping to start the engine, and (4) deceased was then seen by another employee to stop and pick up sand and to advance with cupped hands toward the engine?

Question Now Presented for Reargument

This Decision in the Third Circuit Now Creates a Distinct, Irreconcilable Conflict with a Decision of the Past Month in the Second Circuit

On May 14, 1947, this court, in a *per curiam* opinion, affirmed the action of the court below in entering a judgment N. O. V. for the railroad, stating, *inter alia*, as follows:

> "The basis of this action (N. O. V.) was his conclusion that there was no evidence upon which negligence on defendant's part could be predicated. We agree with this conclusion."

This decision, we believe, is irreconcilably contrary to the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of Edward Mostyn, Appellee, v. D., L. & W. R. R. Co. and S. H. Golden Company, Inc., opinion by L. Hand, J., dated May 9, 1947, where the court held, under almost precisely the same legal circumstances as here, that there was adequate evidence to support a jury finding in favor of the injured plaintiff.

[fol. 190] Argument

Judge Kirkpatrick, in granting defendant's motion for judgment, N. O. V., after conceding that the evidence would sustain a finding that Sunderlin did not maintain a lookout ahead at all, from either the side or the front window, said (154a):

> "Whether he could have looked or did look out of the front window, as he proceeded—a matter as to which there was a conflict of testimony—is of very little moment in view of the fact that the side window gave him a much better view * * * along the track and, concededly, he did not look out of the side window. The matter of the front window might have been important if the injury had been to a brakeman on the track or on the cars but the question here is negligence with respect to a man walking along at a safe distance beside the engine, with no reason to be on the train or to come close to it. 'Actionable negligence is negligence to the particular person who has been injured. * * * *The decisions are substantially unanimous to the effect that it is not sufficient to show that the defendant owed to another person or class of persons a duty which, had it been performed, would have prevented the injury of which complaint is made by the plaintiff'*, American Jurisprudence, Negligence, Paragraph 18." (Italics ours.)

To paraphrase the finding of the court below, it would appear that its position simply was that as to this decedent, there was no duty on the engineer to maintain a lookout ahead while operating the engine, regardless of the fact that he did owe a duty to maintain such lookout ahead for signals from McGowan, the front brakeman. Concededly, [fol. 191] had the engineer maintained a lookout ahead, he

would have had the decedent within his constant full view. (108a)

In Mostyn v. D., L. & W. R. R. Co., et al., supra, the facts were these: Mostyn was one of a gang of casual track-workers employed by the railroad in track repairs in the neighborhood of Sherburne, New York, near Syracuse. While in the railroad's employ the Golden Company housed and fed the men at Sherburne in "bunk cars" (disused railway cars fitted up with bunks for their accommodation and standing upon an unused track). The track, on which the "bunk cars" stood, ran north and south, and to the west of it was another track, not ordinarily used, which the workmen had to cross to enter or to leave the "bunk cars." Mostyn had worked for the railroad at Sherburne for eight or nine days in June, 1944. He then left and went to work for another road at Buffalo, but came back to Sherburne some time in July. The 10th of August was a Thursday, and he finished work at about 3:30, receiving a pay-cheque for a fortnight's wages. He had been sleeping and eating in the "bunk cars", and presumably he slept in them or close outside on Thursday night. On Friday morning he did not work; but after washing his clothes, he went in town on errands of his own and did not come back until evening. He took his supper in a "bunk car", but as he had found the bunk in which he slept so verminous that it was impossible to sleep and as the night was hot, he took his blankets and lay down to sleep parallel with the west rail of the track we have just mentioned, about three or four feet away. At about one o'clock on Saturday morning it became necessary to pull out some refrigerator cars that lay on this track just north of the "bunk cars", and to do so a locomotive with its tender backed north along it to couple with them. At the time when it reached the spot where Mostyn lay, there were two men upon the locomotive proper and two upon the rear of the tender. One of the last was standing upon a "stirrup" on the west side of the tender carrying a lantern; the other was [fol. 192] above him on a ladder which ran to the top of the tender. An electric bulb of 150 watts at the rear of the tender illuminated the track for about 800 feet ahead except the first thirty feet just in front of the tender. The engineer was looking backward down the track on the west side of the locomotive which was moving at about two miles an hour without ringing any bell. In some unexplained way

Mostyn's right foot was cut off by the wheels of the tender or the locomotive; a possible explanation is that he woke up as the tender was passing, turned on his left side and put his right leg over the rail. There was some confirmation for this explanation in the testimony of some witnesses that no blood was found on the first seven wheels of the tender and locomotive. The judge left it to the jury to say whether he was employed in interstate commerce at the time, whether the operation of the locomotive was negligent, and how far he was guilty of contributory negligence.

In reviewing the question of whether the evidence would support the jury finding of negligence against the railroad, the court said, as follows:

> "There was evidence to support a verdict against the railroad for negligence. It was proved that the men in the 'bunk cars' constantly crossed the track, and had to do so, for, as we have said, their only exit was on that side. The infrequency of the track's use was an assurance of safety, and an added ground for caution on those occasions when it was used. *It might have been possible to argue, although the likelihood that men might be crossing the track was ground for raising a duty towards them, Mostyn, who lay asleep beside the track was not within the class to which that duty was owed and could not take advantage of its breach, even though he would have escaped had the duty been performed.* However, Mostyn testified that two of his supervisors had suggested that the men should sleep outside; and hence the duty was not limited to those [fol. 193] who were crossing the track. The jury was free to find—indeed could scarcely have avoided finding—that even the most casual lookout would have discovered Mostyn lying where he was; and his contributory negligence in doing so was of course not a defence. * * *" (Italics ours.)

Admittedly, in that case, as in ours, there was no specific knowledge on the part of anyone that the injured would lie down to sleep, as he unnecessarily did, any where near these tracks in an area of such obvious danger to himself. The plaintiff's sole justification therefor was that his supervisor had suggested that the man should sleep "outside".

This merely meant, anywhere outside of the bunk. Certainly it carried with it no suggestion that Mostyn, or any other employee with any regard whatsoever for his own well-being, would undertake to sleep within a few feet of a railroad track.

The argument upon which Judge Kirkpatrick granted N. O. V. for the defendant was that as to the decedent, there was no duty to maintain a lookout, regardless of any duty as to any other persons, and therefore, there was no negligence. Judge Hand recognized and answered that very same argument in the section quoted above, when he said,

> "It might have been possible to argue, although the likelihood that men might be crossing the track was ground for raising a duty towards them, Mostyn, who lay asleep beside the track was not within the class to which that duty was owed and could not take advantage of its breach, even though he would have escaped had the duty been performed. (Restatement of Torts, Sec. 281(b), Comment c.)"

And then replied,

> "The jury was free to find—indeed could scarcely have avoided finding—that even the most casual look-[fol. 194] out would have discovered Mostyn lying where he was; and his contributory negligence in doing so was of course not a defence."

In our case we are in a much stronger position inasmuch as the fact that the decedent was within a few feet of the engine was a fact of which the engineer admittedly had knowledge when he made the fatal move. Furthermore, we are fortified in our position by the attending circumstances enumerated in the statement of Question Originally Presented on page 1 hereof. In Mostyn, the engineer actually had no reason to suspect that the injured would be lying alongside the track or anywhere within the ambit of danger.

Perhaps the imposition of the duty to maintain a lookout ahead in the Mostyn case was based upon a more positive recognition of the edict of the United States Supreme Court in construing the meaning of the word "negligence" as used

in this Act. In Jamison v. Encarnacion, 281 U. S. 635, at page 640, the Court said:

> "The Act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used. Miller v. Robertson, 266 U. S. 243, 248, 250."

There is this very definite distinction between the strict legalistic definition of "negligence" as ordinarily used by the common law courts and the way the United States Supreme Court has defined "negligence" and considered it in the light of employee suits in railroad and ship cases. In Rankin v. Iron City Sand and Gravel Corp., 356 Pa. 548, 552, the Pennsylvania Supreme Court in deciding a case under [fol. 195] the Jones Act, recognized that it could not follow its own narrow, inelastic test for negligence and found negligence in that case in accord with previous United States Supreme Court rulings in employee suits.

We respectfully submit that the legal questions are precisely apposite in the instant case and the Mostyn case, but that for cases under the Federal Empolyers' Liability Act, the more liberal approach followed by Judge Hand in the Mostyn case is the proper one in the light and spirit and intention of Congress in writing this Act.

Furthermore, it is the jury alone that must evaluate the given conduct, and determine whether it amounts to negligence. Particularly do we contend this fact to be true because the United States Supreme Court in Bailey v. Central Vermont Ry., 319 U. S. 350, at 353, specifically said:

> "*Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries.* The method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these work-

ers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Again, in Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, at page 67, the United States Supreme Court said:

"No case is to be withheld from a jury on any theory of assumption of risk and *questions of negligence should under proper charge from the court be submitted to the* [fol. 196] *jury for their determination.* Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, etc., R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478." (Italics ours.)

Respectfully submitted, B. Nathaniel Richter, for Richter, Lord & Farage, Counsel for Plaintiff-Appellant.

We hereby certify that the within petition for re-hearing is presented in good faith and not for delay.

B. Nathaniel Richter, for Richter, Lord & Farage, Counsel for Plaintiff-Appellant.

[fols. 197-198] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLEE'S REPLY TO PETITION FOR REHEARING

[fol. 199] ARGUMENT

Appellant has filed a petition for rehearing which urges that the decision of this Court, entered on May 14, 1947, is in irreconcilable conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Mostyn v. Delaware L. & W. R. R. and Golden Co., Inc.*, decided May 9, 1947, in an opinion by Judge Learned Hand (Swan, J., dissenting). As this Court recognized at the argument, the decision in the instant case depends almost entirely on a correct understanding of the facts and evi-

dence, and thus a reply to the petition is necessitated by the fact that the petition is based on inaccuracies and misstatements of facts.

The statement of the "Question Originally Presented" (Petition for Rehearing p. 1) is inaccurate and misleading in the following respects:

1. It is stated that defendant's "engineer was operating his engine blindly, without looking out of either of the two windows." The engineer, on the contrary, testified that he was looking out of the front window of the engine (pp. 102a, 103a, 119a).

2. It is stated that "as a result of such blind driving, he failed to see an employee putting sand on the tracks." The uncontradicted evidence showed that the engineer, when looking out of the front window, could not have seen an employee approaching the engine from the side (as plaintiff's decedent had approached the engine in this case) and that even looking out of the side window could not have observed anyone along the side of the engine within two or three feet of the engine (pp. 46a, 47a, 50a; 119a, 120a, Appellee's Brief, pp. 21, 22). Thus, even if it could be contended that the engineer was driving blindly, any failure to observe plaintiff's decedent was not the result of blind driving. There was no evidence that the deceased was putting sand on the tracks.

[fol. 200] 3. It is stated that "the engineer, had he looked out of the side window, admittedly could have seen deceased all the time." The uncontradicted evidence is that the engineer, even looking out of the side window, could not have observed the deceased if the latter was within two or three feet from the engine (pp. 46a, 47a, Appellee's Brief, pp. 21, 22).

4. It is stated that "the engineer had seen the deceased immediately before, only seven or eight feet distant, walking toward the engine." This is the same misstatement of fact which was contained in appellant's initial brief and was urged by appellant at the oral argument. The uncontradicted evidence showed that the engineer observed the deceased, who had no duties to perform at the time in connection with movement of the engine, walking in the same direction in which the train was moving, along a track which diverged from and was ten to twelve feet away from and

three to four feet below the track on which the engine was being operated (see analysis of all the testimony on this point, Appellee's Brief, pp. 8-12).

5. It is stated that the "deceased had conversed with the engineer about the slipping wheels and about helping to start the engine." The conversation between the deceased and the engineer is set forth and considered in Appellee's Brief (pp. 13, 14) and even a casual reading of that conversation leads inevitably to the conclusion arrived at by Judge Kirkpatrick, who stated that plaintiff's contention that the conversation put the engineer on notice that plaintiff planned to assist in moving the engine "cannot be seriously considered" (p. 153a).

6. It is stated that "deceased was then seen by another employee to stop and pick up sand and to advance with cupped hands toward the engine." As was pointed out in appellee's brief, the question of the negligence of the brakeman, McGowan, who observed some of the deceased's movements, prior to his death, from the front of the train, one [fol. 201] thousand feet away, was never raised at the trial of this case (Appellee's Brief, pp. 5, 6). Furthermore, McGowan, at the time of his observation, had no knowledge of what substance the deceased picked up when he stooped down, and only ascertained that it was sand on examination after the deceased was killed; and, when McGowan last observed Eckenrode, the latter was moving diagonally toward the train but had not even ascended the embankment between the Hastings Fuel Track and the track on which the train was moving (pp. 82a, 83a, 85a, 87a, 88a).

Plaintiff asserts that the decision of the Second Circuit in the *Mostyn* case was made "under almost precisely the same legal circumstances as here" (Petition for Rehearing, p. 1). However, an examination of the facts and evidence in that case, as summarized in the Court's opinion, makes it clear that the cases are entirely dissimilar on their facts. At the outset, it should be pointed out that a major portion of Judge Hand's decision was devoted to the question of whether or not the plaintiff in the *Mostyn* case was an employee within the meaning of the Federal Employers' Liability Act at the time he received his injury. Only a little more than one paragraph in the opinion is devoted to the question of the sufficiency of the evidence of negligence. In that case, however, it appeared that the

plaintiff, who was injured while sleeping alongside defendant's track, was sleeping in the same area as that which was normally used, by employees engaged in the same work as that in which the plaintiff was engaged, to gain access to the sleeping car which was provided by the defendant for such employees. It further appeared that the plaintiff had been ordered by his supervisors to sleep outside of the car, due to the fact that the "bunk car" was infested with vermin. Although the evidence on this phase of the case was not set forth in any detail in Judge Hand's opinion, it is apparent from a reading of the opinion that only on the basis of the evidence that plaintiff had been ordered to sleep outside the car did the Court decide that the plaintiff was within the class of persons to whom [fol. 202] the defendant owed a duty to keep a lookout. Thus Judge Hand in his opinion, after mentioning the possibility that plaintiff was not within the class of persons crossing the track as to whom defendant owed a duty to keep a lookout, stated:

> "However, Mostyn testified that two of his supervisors had suggested that the men should sleep outside; and *hence the duty was not limited to those who were crossing the track.*"

In the instant case, however, it was undisputed, not only that the deceased had not been directed to do anything in connection with the running of the engine, but that, in fact, his duties required him to be in an entirely different area—in the caboose, behind the engine (pp. 13a, 62a, 86a, 117a).

In this connection, the portion of Judge Hand's opinion which is not set forth at page 4 of the Petition for Rehearing, although it immediately precedes the language there quoted, is informative. As to the likelihood that plaintiff would choose a resting place within the orbit of danger, he said:

> ". . . the fact that he was driven out because the cars were unfit for sleeping, made it reasonably forseeable that he would seek a substitute; and a jury might find a nearby bed on the earth such a substitute on a hot August night."

Judge Hand's opinion does not indicate any intention to deviate from the principles outlined in the Restatement

of Torts, Section 281c (cited in the opinion), where it is stated:

> "If the actor's conduct creates a recognizable risk of harm only to a particular class of persons, the fact that it causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not render the actor liable to the persons so injured."

[fols. 203-204] Applying the principles so stated to the facts of the instant case, it is seen that, although defendant might owe a duty to persons crossing its tracks, if it had reason to know that persons might be crossing the tracks in the vicinity, so that a failure of the engineer to keep a lookout ahead would constitute negligence as to persons of such class who were run down by defendant's train, still, defendant owed no duty to one observed walking along a roughly parallel, but divergent, track, separated from the track on which the engine was running by an embankment several feet high, and any failure to keep such person under observation, or even a failure to maintain a lookout along the area in front of the moving engine, would not constitute negligence as to such a person. Certainly, such a conclusion is inevitable under the facts of the instant case, where it was shown, by the uncontradicted evidence, that the deceased, when walking along the adjoining track, was fully aware of the movements of defendant's train.

Respectfully submitted, Owen B. Rhoads, H. Francis DeLone, Attorneys for Appellee.

Barnes, Dechert, Price, Smith & Clark, Of Counsel.

[fol. 191] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9330

JULIA ECKENRODE, Administratrix of the Estate of JOHN HENRY ECKENRODE, Deceased,

v.

PENNSYLVANIA RAILROAD CO.

REPLY TO DEFENDANT'S ANSWER ON PETITION FOR REHEARING

The plaintiff takes vigorous and indignant exception to defendant's suggestion that the plaintiff's statement of facts is inaccurate. To the contrary, it is defendant who is maliciously and deliberately guilty of distortions.

Defendant knows full well that, after a verdict for the plaintiff, all issues of fact and all inferences must be resolved in favor of *plaintiff*. Defendant is not entitled to single out a single shred of evidence in its favor and to allege it as a fact if there be the slightest evidence to the contrary.

Plaintiff wishes to answer defendant's points seriatim.

1. Plaintiff reiterates that defendant's engineer *was* driving blindly. Sunderlin, himself testified that he was driving in a sitting position (102a), and the "regular" engineer testified that *one cannot look out of the front window from a sitting position* (45a). Since Sunderlin could not look out the front window, and admittedly did not look out the side (107a), he unquestionably was driving blindly. The most that can be said for defendant is that there was a conflict of testimony as to whether Sunderlin could have look- out the front window. See opinion of Judge Kirkpatrick, (154a). In view of the verdict for the plaintiff, the only permissible finding is that the engineer did drive blindly.

[fol. 192] 2. The engineer could have seen decedent as he approached towards the engine with cuffed hands, at least until he was two feet from the wheels. Indeed, it was suggested by Ingolsby that by hanging out of the cab window, he could see even where the sand was falling on the track (46a). In any event, if the engineer could see

Eckenrode even two feet from the wheels, walking towards the engine with cuffed hands, that would have been more than enough to put the engineer on notice of the decedent's movements, and the jury so found.

It is not true, as the defendant states, that "there was no evidence that deceased was putting sand on the tracks." That defendant is guilty of wanton distortion in this respect is made clear by Judge Kirkpatrick's opinion, where he says (151a):

> "The plaintiff's theory of the manner in which Eckenrode met his death was that in attempting to put extra sand on the track—his head had been struck—*There was evidence to support this theory* in that another brakeman saw Eckenrode, after he had walked about a hundred feet along the siding, pick something up from the ground and start diagonally up the embankment toward the main track, holding his two closed hands out in front of him." (Emphasis ours).

3. Defendant denies that "the engineer, had he looked out of the side window, admittedly could have seen deceased all the time," but Judge Kirkpatrick, himself, said in his opinion (154a):

> "—concededly, he did not look out of the side window."

In his charge to the jury, Judge Kirkpatrick said (Appendix for Appellee, 6a):

> "He could ~~have~~ seen Eckenrode—there is no question about that—if he had leaned out of the cab or put his head out of the side window of the cab and followed him with his eye. *He could have seen him all the time.*" (Emphasis ours.)

[fol. 193] 4. Defendant denies that "the engineer had seen the deceased immediately before only 7 or 8 feet distant, walking towards the engine." While evidence as to distance conflicted, the estimate of 7 or 8 feet was given by the "regular" engineer (58a), who, incidentally, was the only witness with photographs in front of him when distances were estimated. Defendant again seeks to avail itself of the inferences most favorable to the defendant, knowing full well that the plaintiff is the one entitled to the

best inferences. Sunderlin himself said that *deceased was "walking toward the front of the train"* (107a). The "regular" engineer also said that decedent "*was walking to the front of the train*" (64a).

It was solely for the jury to say what those words, "towards the front of the train," meant. Plaintiff is entitled, at the worst by inference, to the assumption that the defendant was not walking away, on the divergent tracks, but *towards* the engine. Such inference from those words seems inescapable in view of the jury verdict.

5. No matter what the precise conversation between the deceased and the engineer, the important point is that it put the engineer on notice that the deceased was aware of the slipping trouble, and might, therefore, do something about it. The jury was entitled to find that fellow-crew members would be likely to assist one another under such difficulties.

6. It is not true that McGowan's negligence was not at issue in the trial. *All* defendant's employees were charged with negligence, so much so, that Judge Kirkpatrick permitted plaintiff to cross-examine *all* of them as hostile witnesses, on the very ground that they had all been charged with negligence (23a).

In any event, even if the particular theory was not relied upon below, "all testimony introduced by either the plaintiffs or the defendants should be considered:" Stafford v. Roadway Transit Co., 70 F. Supp. 555, 574 (W.D. Pa. 1947). [fol. 194] See also Globe Liquor Co., Inc. v. Roman, 160 F. 2d 800 (C.C.A. 7, 1947, Rule of Court stated at Page 802):

> "Of course, where on trial evidence is admitted without objection which proves a different case from that alleged in the complaint, we may consider the pleadings amended to conform to the evidence thus introduced. Fed. Rules of Civil Procedure, Rule (15b), 28 U.S.C.A. following Section 723c."

In any event, if McGowan from where he was, could see the deceased walking with cuffed hands "towards the engine" (84a), clearly, Sunderlin could have seen him and the sand in Eckenrode's hands.

7. A word more about the Mostyn case. The dissent therein was on other grounds, and the holding that there was negligence qua the plaintiff was unanimous.

It is true that in the Mostyn case employees normally crossed the track near the point where the accident occurred. But plaintiff was hurt while *sleeping* alongside the tracks, not while crossing them. There was less reason to expect Mostyn to be sleeping near the cars, and far more reason to expect Eckonrode, who knew of the slipping, near the track, especially after being seen walking "towards the train." Mostyn had been directed to sleep outside, *but certainly not directly along the cars or tracks.* No one in his right mind would have foreseen a probability that Mostyn would choose to sleep directly next to a track. Yet negligence was found *as to him* despite the Court's awareness of the principle of Section 281c of the Restatement. After all, "there are situations in which obvious probability of harm to one class of persons may be considered in determining whether an act is negligent to a person of a different class:" Restate. Torts, Section 281, comment d.

Both in the Eckenrode and Mostyn cases, the accident occurred at a point where some employees could be expected. If anything, the Eckenrode case is stronger, for in Mostyn, the engineer at least was looking backward as [fol. 195] he drove the turn. In Eckenrode, the engineer drove entirely blindly. Under the Mostyn decision, therefore, plaintiff in Eckenrode is clearly entitled to recover.

Since the first hearing in this case and since the petition for rehearing, the United States Supreme Court has reiterated its view that issues of negligence shall not be taken away from the jury, so long as there is some evidence to support the jury findings. This is so even if the Court might draw contrary inferences or feel that other conclusions are more reasonable. See Myers v. Reading Railroad, decided June 2, 1947, reaffirming Lavender v. Kerns, 327 U. S. 740.

We respectfully remind the Court that the sole basis upon which an n.o.v. could possibly have been entered in this case was as follows.

The defendant contends that since one of the employees (whom of necessity) the plaintiff was obliged to call to establish the facts in the occurrence had said that the decedent had no duties to perform at the place where he was injured, that there was no duty to maintain a lookout as to him; that this was plaintiff's own witness and that, therefore, plaintiff was bound by his testimony.

To the contrary, this testimony was developed on so-called cross-examination by the defendant of a witness still in its employ who would naturally be hostile to the plaintiff and whose very own conduct was being challenged as the causitive negligence. Furthermore, this line of so-called cross-examination went beyond the scope of the direct examination and pro tanto he had become the defendant's witness.

[fol. 196] Thus, in Zumwalt v. Gardner, 160 F. (2) 298, 303 (C. C. A. 8, 1947) a Federal Employers' Liability Case, the Court said:

> "As to that part of the cross-examination which clearly went beyond the limits of the subject matter covered in direct examination the witness became defendant's own witness."

The sole purpose for which the plaintiff called this witness was to establish the actual operations involved. The defendant undertook to establish the purposes and the customs and the obligations and duties as they should have been performed. Clearly, this was not proper cross-examination in the usual meaning of the word. This was part of the defense that the defendant sought to introduce into the plaintiff's case.

Thus, the plaintiff's own case was devoid of testimony on the decedent's duties except those that arose by operation of law. In view of the decedent's death a presumption arises (a) that the decedent acted with due care and (b) that he was where he should have been and was performing his proper duty.

See: Tenant v. Peoria Ry. Co., 321 U. S. 409, 412 (1944), where the Court said:

> "To this evidence must be added the presumption that the deceased was actually engaged in the performance of these duties and exercised due care for his own safety at the time of his death."

The jury in this case decided that the decedent did not exercise due care by finding him guilty of contributory negligence and by finding for the plaintiff they did also find [fol. 197] that he had a right to be there and that a duty of care toward him was owing, and that that duty was violated.

Even if the cross-examination was within proper limits, indeed, even if these witnesses were plaintiff's alone, the jury was entitled to disregard all or any part of their testimony. Such testimony would have no conclusive effect whatsoever and would in no way affect the plaintiff's proof of negligence.

In Chicago & N. W. R. Co. v. Grauel, 160 F. (2) 820 (C. C. A. 8, 1947) the Court said, at page 826:

> "Guided by our interpretation of the cases lately decided by the Supreme Court, we cannot say that the verdict of the jury in this case is without substantial basis in the evidence. It is true that if the jury was required to accept the testimony of the engineer concerning what occurred on the stock track, a finding of negligence on his part contributing to the cause of Grauel's injury and death could not be sustained. *But the mere fact that the engineer, as well as the other witnesses, was called by the plaintiff, did not bind the jury to accept the evidence given by them.* The jury was still judge of the credibility of these witnesses and of the weight to be given their testimony. The jury could take into consideration in appraising this testimony the fact that they were employees of the appellant railway company and, as such, interested in avoiding the imputation that their negligence caused the death of a fellow employee. . . ." (emphasis ours).

Accordingly, the jury was at perfect liberty to disregard all of the testimony produced on the record by the defendant's employees to the effect that the decedent's duties did [fol. 198] not require him to be where he was. They were, therefore, clearly entitled to find that his duties did require him to be there and that, therefore, the engineer owed him a duty of care in looking out for his presence at that point.

With this presumption, in fact, there was under the most conservative approach to the question an issue of fact as to the propriety of the decedent being there that only the jury had the power to decide. What is more, the mere fact that in the defendant's case evidence appeared that denied that the decedent had duties to perform at that place at the time of the accident did not dissipate the probative value of that presumption.

In Jesionowski v. Boston & Maine Railroad Co., 67 Supreme Ct. 401 (1947) the necessary legal facts to meet the

plaintiff's burden of proof with regard to establishing negligence were created by the operation of the presumption of res ipsa loquitur. The defendant offered innumerable facts which, if believed, would have completely denied and destroyed the probative force of the facts supplied by the presumption. Nevertheless, the Supreme Court held that it was for the jury to see which facts they were going to believe and if they did not believe the railroad's facts, the presumption remained intact and would go on to have its usual force and effect sufficient to support the jury's verdict in favor of the plaintiff.

In our case, the jury had the right to disbelieve this self-exculpatory statement of the witness who said that our decedent had no duties at the place where he was. To the contrary, the jury could accept the facts supplied by the presumption of his death while in the employ of the railroad. [fol. 199] In line with the holding of the Tennant Case, our decedent was performing his duty at the time of the accident and was where he should have been.

If Eckenrode had survived and had testified that he had duties to perform at the place of the accident, admittedly an issue of fact would have existed, notwithstanding all of the defendant's testimony to the contrary.

See for example, Ellis v. Union Pac. Railroad Company, 67 Supreme Court, 598 (1947) where the defendant offered proof that the plaintiff had no duty to perform where he was; that there was no necessity for his services at the time; that there were warning signs not to be in that place at all; that the engineer was unaware of any hazard that might come to the plaintiff by reason of his being where he was; and that, in fact, the engineer operated the engine most vigilantly, nevertheless the Court held that because the plaintiff had testified that he was supposed to be where he actually was at the time of the accident, that an issue of fact was made out for the jury.

The presumption arising from his death is created for the very purpose of, and does supply that which his death has sealed his lips from telling the jury.

Compare Sweeting v. Penna. Railroad Co., 142 F. (2) 611 (C. C. A. 3, 1945) where the Court invoked a very similar presumption in order to reverse a directed verdict for the defendant, and granted a new trial to the plaintiff, in a Federal Employers' Liability case.

[fol. 200] It is respectfully urged that a new hearing be granted.

Respectfully submitted, Richter, Lord & Farage, by (S.) S. Nathianiel Richter.

[fol. 201] [Endorsed:] In the U. S. Circ. Ct. of App. for the Third Circuit. No. 9330. October Term, 1946. Julia Eckenrode, Administratrix of the Estate of John Henry Eckenrode, Deceased, v. Pennsylvania Railroad Co. Reply to Defendant's Answer on Petition for Rehearing. Received & Filed Jun. 17, 1947. William P. Rowland, Clerk.

[fol. 202] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9330

JULIA ECKENRODE, Admx. of the Estate of JOHN HENRY ECKENRODE, Deceased, Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY, Appellee

SUR PETITION FOR REHEARING

And now, to wit, on July 10, 1947, after due consideration, the petition for rehearing in the above-entitled case is *denied.* hereby granted.

Philadelphia, —— —, ——.

Herbert F. Goodrich, Circuit Judge.

Endorsements: Order granting Petition for Rehearing. Received & Filed July 10, 1947. Wm. P. Rowland, Clerk.

[fol. 203] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9330

JULIA ECKENRODE, Administratrix of the Estate of JOHN HENRY ECKENRODE, Deceased, Appellant,

v.

PENNSYLVANIA RAILROAD CO.

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Reargued October 17, 1947

Before Goodrich, McLaughlin and O'Connell, Circuit Judges

OPINION OF THE COURT—Filed December 18, 1947

By GOODRICH, Circuit Judge:

John Henry Eckenrode, a railroad man for more than forty years, was killed in an accident on October 8, 1943. His widow, as administratrix, sued the railroad company under the Federal Employers' Liability Act [1] for damages [fol. 204] resulting from his death. There was also a claim based on the Safety Appliance Act which has disappeared, in the jury's verdict against the plaintiff on this point. The jury, however, after finding the decedent was guilty of contributory negligence, returned a verdict for $10,000 against the railroad and made two special findings [2] which are consistent with this verdict. The Trial Judge subse-

[1] 35 Stat. 65 (1908), 53 Stat. 1404 (1939), 45 U.S.C.A. § 51 (1943).

[2] The jury gave affirmative answers to these interrogatories:

"Was Sunderlin negligent in not seeing Eckenrode after their conversation?

"Was there anything which a reasonably careful man in Sunderlin's position should have done which would have avoided the accident even if he had been watching Eckenrode to the best of his ability?"

quently set aside the verdict, basing his action on a carefully considered opinion[3] in which he reached the conclusion that there was no evidence on which the jury could find against the defendant. The plaintiff appeals.[4]

We agree with the Trial Judge. We are fully conscious of the weight to be attached to the jury's finding, which weight becomes the greater, we believe, when it is backed up by specific findings upon interrogatories submitted by the Trial Judge which go to the very heart of the case. We recognize that the plaintiff is entitled to the most favorable interpretations of the facts in her favor and all the inferences which may reasonably be drawn from the facts established by the evidence as viewed in the light most favorable to the plaintiff's case. But with all of that in mind, we still conclude that there is no evidence on which a recovery based upon negligence on the part of the defendant can be sustained.

Case law does not help us much here.[5] There is no dispute that the foundation of recovery under the Act is [fol. 205] negligence on the part of the defendant.[6] There is no doubt of the duty of the defendant to exercise care toward employees in the operation of trains. The difficult part of the decision comes in applying non-disputed rules

---

[3] 71 Fed. Supp. 764 (E.D. Pa. 1947).

[4] The District Court was affirmed per curiam, May 14, 1947. Rehearing was granted July 10, 1947.

[5] "An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury for the decedent's estate based upon reason is of no doctrinal importance. Every case varies. However, the soundness of the judgment entered in the State Supreme Court depends upon an appraisal of the evidence * * *". Brady v. Southern Railway Co., 320 U. S. 476, 480 (1943).

[6] "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances, or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54, 67 (1943). Also see Brady v. Southern Railway Co., 320 U. S. 476 (1943).

of law to the facts. We turn, therefore, to the facts concerning this accident.

The time was about noon on October 8, 1943. The scene is a portion of the tracks of the Pennsylvania Railroad in the coal country a few miles east of Cresson, Pennsylvania. An engine of the pusher type has pulled four loaded coal cars out on to the main track from a spur line known as Hastings Fuel. The four cars have been pushed up to where eighteen other loaded cars stand on the main track. Eckenrode, the decedent, effects the coupling and then goes back to the caboose, which is the right place for him to go, his duty for the present being completed with the coupling of the four cars to the train.

The next step in the operation is to push these twenty-two loaded cars up a grade to join with another engine and additional cars which are being assembled at a point called Red Top. At the front of our twenty-car train stands McGow-n, the brakeman. He gives the signals for stopping and starting. In the engine cab are Sunderlin, acting as engineer, and Ingoldsby, fireman. Sunderlin applies power. The train moves a little and then the wheels skid, revolve rapidly without producing the necessary traction. The engineer closes the throttle and tries again. This process is repeated a number of times, each attempt resulting in a short forward movement of the train. It is slow, of course. The speed is probably not more than a mile and one half an hour.

While this pushing, starting, and stopping business is going on, Eckenrode comes from the cabin and walks up [fol. 206] past the cab of the engine. He suggests to the "big boy" at the throttle that if the latter cannot move the train he, Eckenrode, will get a bar and bar it up. This remark receives a derisive rejoinder from Sunderlin, who continues to open and close his throttle as before. Eckenrode continues forward[7] and is seen by all three of the train crew walking along the Hastings Fuel track. This will place him some twelve feet away from the side of the engine with the distance between him and the train increasing as Eckenrode continues to walk down the spur. It also

[7] If Eckenrode had been serious in his statement to get the bar he would have gone back to the caboose which was the place where such tools were kept.

places him below the level of the coal train since the spur is on a down-grade from the frog and the main line is on an up-grade from the frog. This is the last time that Sunderlin sees Eckenrode until after the accident.

McGowan, the front brakeman, at his post twenty-two cars ahead of the engine, however, sees Eckenrode walking down the Hastings Fuel spur and then diagonalizing up the bank toward the train. He observes Eckenrode, as he walks up the embankment, stoop down and evidently pick up something. Later McGowan discovers marks which look to him like finger marks where Eckenrode stooped. In a time less than it takes to relates the matter by the printed page, there has been an accident. Somehow or other Eckenrode's head has been struck between the lap and lead lever and the cylinder head of the engine. These lap and lead levers shoot back and forth very rapidly when the wheels are skidding instead of revolving in normal fashion. Eckenrode is unconscious. He is given such aid as the men can give and removed on a stretcher, but dies a few minutes later.

The above story is the sum total of the facts relative to the inquiry here. The facts came from the train crew and the Trial Judge permitted them to be examined as hostile witnesses.[8]

[fol. 207] Out of this we cannot see a scintilla of evidence on which negligence can be found. For a man to be charged

---

[8] Neither we nor the appellee quarrel with that exercise of discretion. Such permission gives the plaintiff greater latitude in the examination of his witnesses and the plaintiff is not bound by their testimony. Boyle v. Pennsylvania R. Co., 346 Pa. 602, 31 A. 2d 89 (1943); Burke v. Kennedy, 286 Pa. 344, 133 Atl. 508 (1926); see Note, Uncontradicted Testimony, 45 Mich. L. Rev. 1034 (1947). But a belief that that testimony is false will not support an affirmative finding that the reverse of that testimony is true. Cruzan v. New York C. & H. Riv. R. R., 227 Mass. 594, 166 N.E. 879 (1917); Boatman's Sav. Bank v. Overall, 16 Mo. App. 510 (1885); Wallace v. Berdell, 97 N. Y. 13 (1884). Plaintiff has the burden of establishing his case by direct or circumstantial evidence; that burden is not met by pointing to the fact that all the available witnesses are hostile and will not testify in a manner which would support the complaint.

with negligence in failing to take precautions there must be some danger toward which these precautions should be directed.[9] Now what was the danger here? From a position of safety in the caboose, back of the engine, comes Eckenrode. He has no duties with regard to the movement of the train at this point. He walks past the cab and he and the engineer exchange talk. Then he starts off along the spur which will take him further away from the train every step. What is there to watch out for? Eckenrode knows the train crew's problem as well as any of the rest of these [fol. 208] men. The evidence showed that he had not only

---

[9] Section 289 of the Restatement of Torts states:

"When the Actor should recognize the existence of risk.

The actor should recognize that his conduct involves a risk of causing an invasion of another's interest, if a person,

(a) possessing such perception of the surrounding circumstances as a reasonable man would have, or such superior perception as the actor himself has, and

(b) possessing such knowledge of other pertinent matters as a reasonable man would have or such superior knowledge as the actor himself has, and

(c) correlating such perception and knowledge with reasonable intelligence and judgment

would infer that the act creates an appreciable chance of causing such invasion."

Comment *b* of that Section is very informative in this connection:

"This Section states one, but only one, of the factors to be considered in determining whether a particular act is or is not negligent. In order that an act may be negligent it is necessary that the actor should realize that it involves a risk of causing harm to some interest of another, such as the interest in bodily security, which is protected against unintended invasion. But this of itself is not sufficient to make the act negligent. Not only must the act involve a risk which the actor realizes or should realize, but the risk which is realized or should be realized must be unreasonable, as to which see §§ 291 to 293."

been a railroad man for more than forty years, but he worked this very run and had done this very job for several years preceding the accident. We think that there was nothing in his conduct to give notice to the engineer of any possible danger involved in the situation. We see no reason why Sunderlin should have kept watch for Eckenrode, who knew as much about what had happened and what they were trying to make happen as the engineer, himself, did. But, further, even if Sunderlin had operated his throttle by touch and kept his eyes on Eckenrode all of the time, still the latter's conduct gave no indication of danger.[10] Going down Hastings Fuel spur was certainly not conduct against which Eckenrode should have been protected, nor was his climbing up the bank so as to get nearer his train. After all, he had to rejoin that train.

The point we are making does not involve assumption of risk. That is out of this law. Nor does it involve contributory negligence. The jury has found that Eckenrode was contributorily negligent. We are not at all sure that that finding could be sustained for it is just as speculative as is a negligence charge against the company. What we are talking goes to the very foundation of liability. It has to do with the duty of Sunderlin, in charge of the operation of the engine, to take precautions against an experienced fellow member of his train crew acting in a wholly unexpectable and unreasonable fashion. We see nothing on which any charge against the company based upon carelessness of the locomotive's crew could possibly be sustained.

The brakeman, McGowan, saw Eckenrode stoop and apparently pick up something. Assuming that what he

---

[10] At the rehearing plaintiff placed great reliance on a recent case in the Second Circuit. Mostyn v. Delaware, L. & W. R. Co., 160 F. 2d 15 (C. C. A. 2, 1947). In that case plaintiff was injured while asleep on the track. It was clear that the engineer had a duty to observe what was in front of him because he was on a track, not ordinarily used, which the workmen had to cross to enter or leave the place where they stayed. If he had looked, as he was required, he would have discovered the danger. In the case at bar, however, the engineer did look and discovered Eckenrode in a safe position, free from all harm. Thus he had no way to anticipate that any accident would occur.

[fol. 209] picked up was sand and McGowan should have recognized it, that would still leave no basis for finding negligence. For even assuming that McGowan should have realized that Eckenrode picked up sand, there was no reason for charging him with negligence in his failing to anticipate that Eckenrode would come up close to the engine and do anything relative to the movement of the train with two handsful of sand. We do not, in fact, know what Eckenrode was doing with the sand, assuming that he had any. Even if it may be inferred that he was trying to sand the tracks with it, it is too much to say that McGowan or other members of the train crew are to be charged with negligence in failing to anticipate this completely unexpectable operation on Eckenrode's part.

Any Federal Judge who sees these railroad accident cases come in and go out of the courts must be troubled by the unsatisfactory social results obtained. Some claimants go out with very large verdicts. Others go out with nothing. Yet in each case the injury has come as part of the business of train movement and the disastrous consequences upon the victim or his family are equally heavy. But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist. It does not exist in this case.

The judgment of the District Court will be affirmed.

O'Connell, Circuit Judge, dissenting:

As I am not in accord with the conclusions reached by the majority, it might not be amiss to review in part the background of this case. After a trial lasting two days, defendant made a motion for a directed verdict. The trial court denied the motion. That the question of defendant's negligence was deemed a jury question is attested by the following excerpt from the charge of the court, to which [fol. 210] defendant did not take exception: "When a man is operating an engine, the question is, do you think he is bound to keep his eye at all times on somebody who is walking alongside the engine at a distance of twelve feet, we will say, on a lower level? Is it want of care or prudence if he takes his eye off that person and does not look at him

any more, but concentrates on the operation of the engine in pushing the cars up the siding? *He could have seen Eckenrode—there is no question about that—if he had leaned out of the cab* or put his head out of the side window of the cab and followed him with his eye. He could have seen him all the time. Is that a requirement of due care? Should an engineer do that? We all know that people walk alongside of tracks. *Are you bound to anticipate that something will happen to them which will throw them under the engine or that they will place themselves in a position where they are going to be hit by the engine? That is a question for you. I am going to leave that entirely to you.* Is it carelessness for a man driving an engine not to keep his eye on a man walking beside his cab at the distance at which Eckenrode was walking?" [1] (Emphasis supplied.)

Eleven interrogatories were submitted to the jury. Answering those interrogatories, the jury, in defendant's favor, found that there had been no violation of the Safety Appliance Acts and that plaintiff had been guilty of contributory negligence; in plaintiff's favor, the jury also found that Sunderlin, the engineer, had been guilty of negligence, and returned a verdict for plaintiff. The court entered judgment on that verdict. It was only after defendant filed a motion nine days later to set aside the verdict, and hearing was held on that motion, that the court [fol. 211] set aside the verdict and judgment and entered judgment in favor of defendant.

In view of what I deem the clear mandate of the Supreme Court, as expressed in Lavender v. Kurn, 327 U. S. 645 (1946), Myers v. Reading, 331 U. S. 477 (1947), and Lillie v. Thompson, — U. S. — (decided November 24, 1947), I am hesitant to invade the fact-finding function of the jury, particularly where, as in the instant case, the jury

[1] It should also be noted that plaintiff requested the following charge: "If under all the circumstances, you believe that the only way that the engineer could get a clear view would be by looking out of the side window, then his failure to do so would be negligence, and if by reason thereof the decedent suffered his fatal injury, then your verdict would be for the plaintiff." The trial court denied the request, with this remark: "I will leave it to the jury to say whether his failure to look out of the side window was or was not negligent."

displayed an ability to give consistent answers to interrogatories, which replies strongly indicate an impartial approach; and where the verdict is not challenged as to reasonableness of amount, if defendant was in fact negligent, and makes ample allowance for plaintiff's contributory negligence. Moreover, it seems illogical to me for the court to accept the jury conclusion as to one finding of fact (that the Safety Appliance Acts were not violated) but reject another (that defendant had been negligent).

The recital of facts in the majority opinion omits what seems to me a very relevant subject. Sunderlin, whose job on the crew was that of fireman but who was acting as engineer,[2] testified that, at the time of the accident, he was seated on the engineer's seat and looking through the small front window, through which he could see alongside the train but could not see along the side of the engine. To "see down the side" of the engine, he said, "you have to look out the side window;" and, had he looked out of the side window, he would have seen Eckenrode.[3]

---

[2] Sunderlin was a qualified engineer, so that no negligence may be imputed to defendant on that score. That his usual duty was other than engineer, however, might have weight in determining whether, under the circumstances, he behaved like a reasonably prudent engineer.

[3] Pertinent extracts from his testimony on this question are:

Mr. Richter [plaintiff's counsel]: "And were you looking ahead?"

Mr. Sunderlin: "Yes, sir."

Richter: "Out of the side window?"

Sunderlin: "No, sir."

. . . . . .

Richter: "By that you mean you would have seen him if you looked out the side window?"

Sunderlin: "Yes."

Richter: "There was nothing to block your view out that side window, was there?"

Sunderlin: "That is right."

Richter: "The window was open, was it not?"

Sunderlin: "Yes."

On the other hand, Ingoldsby, the regular engineer who was acting as fireman when the injury occurred, testified [fol. 212] that, in a seated position, he [4] would not be able to look out of the front window, and further that an engineer running an engine forward hangs out of the side window; that "if you can see out of the front, well, it is just as well," but that "it wouldn't be very nice standing up." Completely apart from any consideration whether Sunderlin was required to keep Eckenrode under *continuous* [5] observation, it seems to me that, on the basis of Ingoldsby's testimony, the jury had an adequate basis for finding Sunderlin negligent in failing to lean out of the side window, especially since he was seated and since his ability to see out of the front window was at best dubious. As an italicized portion of the court's charge quoted above and Sunderlin's testimony clearly indicate, had Sunderlin assumed what the jury must be deemed to have found to be the correct operating position under the circumstances, he would have seen Eckenrode; and, giving the jury verdict the presumption to which it is entitled, I think it must be assumed that the train could have been stopped in time. I am not

---

Subsequently, on cross-examination as to Sunderlin's position, the testimony was:

Mr. Rhoads [defendant's counsel]: "Could you see along the side of the engine?"

Sunderlin: "No, sir."

Rhoads: "Why not?"

Sunderlin: "Because you couldn't see down the side of the engine out that front window. You have to look out the side window."

[4] The exact testimony was:

Mr. Richter: "Sitting down can you look out of that front window?"

Mr. Ingoldsby: "No."

Whether the word "you" means "an engineer" or "Ingoldsby" cannot be determined from the record. For the purpose of this discussion, I treat "you" in its more restrictive connotation.

[5] I consider it immaterial whether Sunderlin had a duty to observe Eckenrode *continuously*. For the purposes of this case, plaintiff need only establish that Sunderlin failed to observe Eckenrode at a time when he had a duty to do so.

prepared to say, as a matter of law, that evidence of negligence in performance of a duty to Eckenrode was not presented in the case *sub judice*.

[fol. 213] Consequently, I believe that the testimony concerning the operating position of the engineer, especially when Sunderlin had reason to know that Eckenrode was not on the train and would have seen Eckenrode had he looked out of the side window, was evidentiary basis for the specific jury finding that Sunderlin was negligent; nor does the fact that a "speculative" element may have been involved in the jury finding warrant the drawing of a contrary inference by the court. See Lavender v. Kurn, *supra* at page 653. On the basis of this testimony alone, I cannot say that there is a complete absence of probative facts to support the jury decision

I differ from the majority reasoning that Eckenrode's status as a railroad man for forty years and his experience on this job he was performing at the time of the accident relieved Sunderlin of the necessity of keeping watch for him; for this, in my opinion, was a jury question which the jury resolved to the contrary. "Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." Bailey v. Central Vermont Ry., 319 U. S. 350, 354 (1943).

Because I believe the instant case to be indistinguishable in principle from Lavender v. Kurn, *supra*, Lillie v. Thompson, *supra*, and Mostyn v. Delaware L. & W. R. Co., 160 F. 2d 15 (C. C. A. 2, 1947), cert. den. October 13, 1947, I am of the opinion that the judgment of the district court should be reversed.

A true copy. Teste:

——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 214] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9330

JULIA ECKENRODE, Administratrix of the Estate of John Henry Eckenrode, Deceased, Appellant,

v.

PENNSYLVANIA RAILROAD CO.

Present: Goodrich, McLaughlin and O'Connell, Circuit Judges.

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed with costs.

For the Court, Goodrich, J.

December 18, 1947.

Endorsements: Order Affirming Judgment etc. Received & Filed. Dec. 18, 1947. Ida O. Creskoff, Clerk.

[fol. 215] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Ida O. Creskoff, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendices to the Brief for Appellant and Brief for Appellee, and proceedings in this court, in the case of Julia Eckenrode, Administratrix of the Estate of John Henry Eckenrode, Deceased, Appellant, vs. Pennsylvania Railroad Co.,

No. 9330, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 28th day of January in the year of our Lord one thousand nine hundred and forty-eight, and of the Independence of the United States the one hundred and seventy-second.

Ida O. Creskoff, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

(4842)

[fol. 226] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 5, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

Term, 194 No 628

JULIA ECKENRODE, Administratrix of the Estate of JOHN HENRY ECKENRODE, Deceased,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN H. HOFFMAN and
RICHTER, LORD & FARAGE,
B. NATHANIEL RICHTER,
510 North American Bldg.,
Philadelphia 7, Pa.,
Counsel for Petitioner.

Martin & Lyle, 817 Weightman Bldg., Phila. 2, Pa.

INDEX

CASES CITED

STATUTES AND AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 194 No.

JULIA ECKENRODE, Administratrix of the Estate of JOHN HENRY ECKENRODE, Deceased,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Julia Eckenrode, Administratrix of the Estate of John Henry Eckenrode, by her attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on December 18, 1947.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 71 F. S. 764 (1947).

The opinion of the United States Circuit Court of Appeals for the Third Circuit is not reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on December 18, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; U. S. C. A., Sec. 347 (a).

QUESTION PRESENTED.

Did not the majority opinion in the Circuit Court of Appeals, 3rd Circuit, err in affirming the action of the District Court in entering judgment N. O. V. for the defendant railroad on the ground that evidence of negligence was lacking, where the jury made specific findings of fact that there was negligence and the majority opinion did not, and could not distinguish LAVENDER v. KURN, 327 U. S. 740 (1946), 66 S. Ct. 740; MYERS v. READING CO., 67 S. Ct. 1334 (1947), 331 U. S. 477; TENNANT v. PEORIA & P. U.

R. CO., 321 U. S. 29, 64 S. Ct. 409 (1944); LILLIE v. THOMPSON, Tr., 68 S. Ct. 140 (1947), and MOSTYN v. DEL., L. & W. R. CO., 160 F. 2d 15 (2 Cir., 1947), cert. den. October 13, 1947, 68 S. Ct. 82, relied upon by the minority opinion which urged reinstatement of the jury verdict for the petitioner.

PROVISION OF CONSTITUTION INVOLVED.

The Seventh Amendment to the Constitution of the United States, in its pertinent parts, provides:

> "In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

STATEMENTS OF THE FACTS.

This is an appeal by petitioner from the action of the Circuit Court of Appeals (3 Cir.) in affirming the entry of judgment N. O. V. after verdict for the plaintiff. The action was brought under the Federal Employers' Liability Act for damages resulting from the death of petitioner's husband, John Henry Eckenrode, while in the employ of the defendant.

The evidence supports the following facts or inferences. The deceased was a flagman (13a), sixty-two years of age (133a), and had been in the employ of the defendant railroad for forty-two years prior to the accident (129a). The accident occurred about noon on October 8, 1943 (9a). Near the point of the accident, the main track lay on an up-grade

(15a) toward the west (77a, 79a). A siding, known as the Hastings Fuel Siding, formed a spur to the right, leading also in a westerly direction from the main spur, but on a down-grade (15a, 40a, 59a). As a result, there was a small two or three foot embankment (58a) between the arms of the Y formed by the two tracks, with the main track being above and the spur track being below. The degree of grade going down to Hastings Fuel was less than the degree of up-grade on the main track (24a). Therefore, the intervening bank being only two or three feet high, a man walking along Hastings Fuel can be seen by one looking out of an engine window from the main tracks (47a). Furthermore, the arms of the Y are fairly close, the main track, at the point where the accident occurred, being only seven or eight feet away from the Hastings Fuel tracks (58a).

Four cars, loaded with coal, had been pulled out of Hastings Fuel past the switch point, at the juncture of the Y (11a, 12a). These four cars were then pushed and coupled on to eighteen other cars similarly loaded, which had previously been left on the main track near the junction point (12a). The switching at the junction and the coupling of the cars were performed by the decedent, Eckenrode (61a). The next movement intended was to push the twenty-two cars uphill some two hundred or two hundred fifty feet in order to couple with some additional cars (14a). The engine was on the rear (11a), being of the "pusher" type and usable only for forward movement (112a). It could not go backward. The cars were being pushed by the front of the engine (12a), and the only thing behind the engine was the cabin or caboose (13a). The defendant's fireman, Sunderlin, who was also a qualified engineer, was operating the locomotive, and the "regular" engineer was acting as fireman at the time (100a).

After Eckenrode's coupling operation, Sunderlin began to push the twenty-two cars. This was uphill pushing. However, in spite of his use of the sanding equipment on the engine, the engine would move only six or eight feet, and would then slip (101a). *Each time the engine slipped,*

Sunderlin would shut off the throttle (20a, 103a). The steam being turned off by the closing of the throttle (103a), the result was that the train *stopped* after each skid (97a). With the power shut off, the lap and lead lever naturally would not move.

After the train had moved only about one or one and a half car lengths (118a), Ingoldsby, the acting fireman, and Sunderlin, the acting engineer, both saw Eckenrode, and a brief conversation took place between Eckenrode and Sunderlin (63a, 81a, 106a). The conversation was about getting the train going (106a), but because of Eckenrode's reference to the use of a crow bar, Sunderlin now says that he regarded Eckenrode's statement as a joke (119a). At the time of the conversation, Eckenrode was close to the engine, on the nearby Hastings Fuel track (63a). The train was then moving very slowly or was stopped because Eckenrode "passed" the engine when he talked to Sunderlin (63a, 75a).

Despite Sunderlin's belated interpretation of his conversation with Eckenrode as a joke, Eckenrode obviously was in dead earnest about helping move the train, for he went a few feet to the Hastings Fuel track to scoop up sand with his hands for the purpose of throwing it under the wheels of the train, to supplement the sand falling from the sanders, in an effort to prevent the slipping of the engine. The sand had been previously dropped by the engine's sanders on the Hastings Fuel track after Ingoldsby had hammered the sanders there to clear the clogging (17a, 24a). Eckenrode was seen by McGowan, the middle brakeman (13a), after the conversation (81a, 82a) to "stoop down and pick up something" (82a), which, from finger marks in the sand on the ground (85a), later proved to be the sand. McGowan then saw Eckenrode walk "toward" the engine with his hands in front of him apparently cupped (82a). These movements McGowan was able to see from a distance of some twenty-two cars (79a), or about a thousand feet. *Had Sunderlin looked down from his seat*

alongside the right hand window in the engine cab, he would have been able to see the sand in the decedent's hands.

When Sunderlin last saw Eckenrode prior to the accident, Eckenrode was *not* going straight down the Hastings Fuel tracks, but *he was walking, according to Sunderlin himself, "toward the front of the train."* This fact was corroborated by Ingoldsby's testimony that Eckenrode "*was walking to the front part of the train.*" In other words, as McGowan, the third witness, put it, Eckenrode "bore to the left • • • towards the train" (82a, 83a), "*toward the engine*" (84a), and walked "diagonally" up the embankment (85a).

Sunderlin next saw Eckenrode lying by the side of the engine (107a, 119a) after the train had completed three or four car lengths of the whole movement (117a) or one and a half or two car lengths from the place where Sunderlin had spoken to Eckenrode. On the cylinder head of the engine marks were found which, in view of the injuries to Eckenrode's face and head, indicated that he had been struck by the piston cylinder (48a, 50a) or driving rods (51a) attached to the wheels, presumably when he leaned over to put the sand, which he was carrying, on the tracks. Admittedly, there was nothing to bar Sunderlin's view from the side window of the engine, and had Sunderlin looked, he could have seen Eckenrode (108a), but he did not look out of the side window (107a). As a matter of fact, Sunderlin was in a sitting position while operating the train (102a), and there was evidence that from a sitting position, one could not see out of the front window (45a). Therefore, since admittedly Sunderlin did not look out of the side window and could not see out of the front window, he was actually driving blindly, and the jury could, and did so find. It is a railroad rule that no train movement is made until the engineer knows the whereabouts of everybody in the crew (952, 962).

The jury in answer to interrogatories found (1) that Sunderlin was negligent in not seeing Eckenrode after their conversation; (2) that if a reasonable man in Sunderlin's

position had been watching Eckenrode to the best of his ability, he could have avoided the accident; (3) that Eckenrode was guilty of contributory negligence; and (4) that plaintiff's damages were $20,000.00, diminished by $10,000.00 for contributory negligence (145a, 146a). Accordingly the jury returned a verdict for the plaintiff for $10,000.00 (146a). On motion by the defendant, the trial Court set aside the verdict and judgment for the plaintiff and entered a judgment n. o. v. for the defendant (156a).

The action of the District Court was appealed and the Circuit Court affirmed, *per curiam*, without an opinion. A petition for reargument was granted, after which the Court affirmed the action of the court below, with a vigorous dissenting opinion by Judge O'Connell. This petition for certiorari follows.

SPECIFICATIONS OF ERROR TO BE URGED.

1. In entering judgment for the respondent.

2. In failing to reverse the Trial Court's order granting judgment N. O. V. for the respondent.

REASONS FOR GRANTING OF WRIT.

1. Petitioner's constitutional guarantee of trial by jury has been violated.

2. The decision of the United States Circuit Court of Appeals (3rd Cir.) is in direct conflict with the principle of the decisions of this Court as expressed in LAVENDER v. KURN, 327 U. S. 740 (1946), 66 S. Ct. 740; MYERS v. READING CO., 67 S. Ct. 1334 (1947), 331 U. S. 477; TENNANT v. PEORIA & P. U. R. CO., 321 U. S. 29, 64 S. Ct. 409 (1944); LILLIE v. THOMPSON, TP., 68 S. Ct. 140 (1947); JOHNSON v. U. S., decided Feb. 9, 1948; and MOSTYN v. DEL., L. & W. R. CO., 160 F. 2d 15 (2 Cir., 1947), cert. den. October 13, 1947, 68 S. Ct. 82. The dissenting opinion is correct in finding that the above cited cases are completely indistinguishable from the instant case, and compelling in support of the jury verdict. The majority opinion implicitly ignores those cases, does not attempt to distinguish them, and holds that the jury finding of negligence is "speculative" and, therefore, unwarranted. Cf. LAVENDER v. KURN, supra, to the contrary.

3. Repeated decisions within the last year in this Circuit reveal an irreconcilable conflict and equal division among the six judges of this Circuit as to the tests to be applied in determining the existence of negligence.

CONCLUSION.

The writ should be granted.

Respectfully submitted,

JOHN H. HOFFMAN and
RICHTER, LORD & FARAGE,
By: B. NATHANIEL RICHTER,
Counsel for Petitioner.

BRIEF.

ARGUMENT.

In this case the evidence clearly shows that Sunderlin, who was operating the engine, knew that the deceased was no longer confining himself to the caboose, but was, in fact, participating in completing the shifting move between the four cars which had been pulled out of the Hastings Fuel track and pushed on to the main track. He had had conversation with the deceased which indicated that the deceased was going to take steps in that direction. The deceased was actually seen walking on Hastings Fuel track by the acting engineer, the acting fireman, and the middle brakeman, at a distance of only seven to eight feet away from the engine. *Each* of these three witnesses admitted that when last seen, Eckenrode was *in motion, walking* toward the train (Sunderlin, 107a; Ingoldsby, 64a; McGowan, 83a). In fact, McGowan specifically said that Eckenrode "bore to the left" (82, 83a) and "walked up toward the engine" (84a), "diagonally" up the embankment (88a), with his hands cupped, carrying something to the train, which later turned out to be sand and which the engineer undoubtedly could have seen and identified from his position, had he looked. This evidence was in no wise controverted.

It is not true, as assumed in the District Court, that the train was in motion when Eckenrode bent over to pour the sand on the track. On the contrary, the evidence indicates, and the jury could, and did find, that the train was *stopped* at the time. The evidence was not disputed that from time to time Sunderlin "shut the throttle off" and would "turn off the steam" (103a). The train stopped "after each skid" (97a).

The lap and lead lever which fatally injured the plaintiff's decedent moves only when the throttle is on, as that is the only time when the power is applied. Conversely, the lap and lead lever is motionless when the throttle is shut off. What happened here was that *while the engine was stopped and the lap and lead lever was motionless* Eckenrode, reasonably believing that Sunderlin, in the exercise of due care, would maintain a proper lookout the side window *before* re-applying the power by opening the throttle, bent over to pour the sand on the track during one of these intermissions, when Sunderlin, without looking and without warning to the deceased, opened the throttle and fatally injured him.

The Circuit Court reasoned that Eckenrode's forty years of experience destroyed any duty, which may have existed, to warn him of the intention to put the lap and lead lever in motion again. On the contrary, that very experience justified Eckenrode's assuming that he who operated the engine would, in the exercise of his duty as an engineer, refrain from making any movement without first assuring himself of the safety of his co-workers. In this case, the throttle was admittedly reapplied without a prior observation for the safety of the train crew and others thereabouts.

The Circuit Court said,

> "* * * We see no reason why Sunderlin should have kept watch for Eckenrode, who knew as much about what had happened and what they were trying to make happen as the engineer, himself, did. But, further, even if Sunderlin had operated his throttle by touch and kept his eyes on Eckenrode all of the time, still the latter's conduct gave no indication of danger."

This was clearly erroneous.

The day was clear and dry (19a). Sunderlin conceded that, had he looked, he could have seen Eckenrode (108a). With Eckenrode only a few feet from the engine, the sand in his cupped hands would certainly have been discernible

to Sunderlin. Under the circumstances, anyone in Sunderlin's position would have realized that Eckenrode meant to get very close to the engine and would almost surely do so; for the sand, if it was to be of any aid to the movement of the train, would have to be placed directly on the track. It would not do to fling it from a distance, for it would then scatter in the air and land everywhere but where it would be most needed. The sand would have to be poured out of Eckenrode's hands not more than a few inches away from the track. Having observed Eckenrode's close approach to the engine with sand in his hands, Sunderlin would have been put on notice to use care in the operation of the train. At least, a jury could reasonably so find, as it did in this case.

Nor was the engineer totally devoid of any prior knowledge of the deceased's intention to return to the engine to help move it. Deceased had specifically told the engineer that he was going to do something about moving it. The District Court, in entering the N. O. V., *decided, as a matter of law, that the deceased was just joking.* But, apart from an understandable and natural tendency for anyone in Sunderlin's position to seek to minimize the import of Eckenrode's remark, as a self-defensive measure, it is submitted that it was for the jury, and not the Court, to determine whether what Eckenrode said reasonably should have put him on notice of the decedent's intention to assist, somehow, in the moving of the engine. Sunderlin may have thought Eckenrode was jesting, but obviously he was in deadly earnest about doing something to stop the slipping, or he would not have tried to do what he did.

The jury was asked and answered interrogatories 3 and 4 as follows:

To interrogatory number 3:

"Was Sunderlin negligent in not seeing Eckenrode *after their conversation*?"

Your answer is "Yes."

To interrogatory number 4:

> "Was there anything which a reasonably careful man in Sunderlin's position should have done which would have avoided the accident even if he had been watching Eckenrode to the best of his ability?"
>
> Your answer is "Yes." (Italics ours.)

The jury implicitly found that deceased and Sunderlin were not joking in their conversation. This was, at least, an issue which the jury alone had the right to decide, in determining whether there was a duty on Sunderlin to look out for the deceased after such notice.

The District Court recognized that there was a duty to maintain a proper lookout, but felt that the deceased was not one of the persons in the group to whom such a duty was owed. The District Court said, at 154a,—

> "Whether he could have looked or did look out of the front window as he proceeded—a matter as to which there was a conflict of testimony—is of very little moment in view of the fact that the side window gave him a much better view * * * along the track and, concededly, he did not look out of the side window. The matter of the front window might have been important if the injury had been to a brakeman on the track or on the cars but the question here is negligence with respect to a man walking along at a safe distance beside the engine, with no reason to be on the train or to come close to it. 'Actionable negligence is negligence to the particular person who has been injured * * * *The decisions are substantially unanimous to the effect that it is not sufficient to show that the defendant owed to another person or class of persons a duty which, had it been performed, would have prevented the injury of which complaint is made by the plaintiff,*' American Jurisprudence, Negligence, Paragraph 18." (Italics ours.)

To paraphrase the finding of the court below, it would appear that its position simply was that as to this decedent, there was no duty on the engineer to maintain a lookout ahead while operating the engine, regardless of the fact that he did owe a duty to maintain such lookout ahead for signals from McGowan, the front brakeman. Concededly, had the engineer maintained a lookout, he would have had the decedent within his constant full view (108a).

The Circuit Court originally affirmed, without an opinion, but, having had directed to its attention the obvious and recognizable conflict between that proposition of law and the view taken of the same question of law in the Second Circuit in the case of MOSTYN v. DEL., L. & W. R. CO., 160 F. 2d 15 (2 Cir., 1947), (Opinion by Judge Learned Hand), granted a re-hearing.

In the MOSTYN case, in reviewing the facts and the question of law, the Court said,

> "There was evidence to support a verdict against the railroad for negligence. It was proved that the men in the 'bunk cars' constantly crossed the track, and had to do so, for, as we have said, their only exit was on that side. The infrequency of the track's use was an assurance of safety, and an added ground for caution on those occasions when it was used. *It might have been possible to argue, although the likelihood that men might be crossing the track was ground for raising a duty towards them, Mostyn, who lay asleep beside the track was not within the class to which that duty was owed and could not take advantage of its breach, even though he would have escaped had the duty been performed.* However, Mostyn testified that two of his supervisors had suggested that the men should sleep outside; and hence the duty was not limited to those who were crossing the track. The jury was free to find—indeed could scarcely have avoided finding—that even the most casual lookout would have discovered

Mostyn lying where he was; and his contributory negligence in doing so was of course not a defence * * *." (Italics ours.)

There was as much a duty to look ahead in the instant case for signals from McGowan as there was in the MOSTYN case for the engineer to look ahead on this infrequently used track for persons who might perhaps be coming from the nearby bunk or shanty. Indeed, the chance that someone would go to sleep alongside that track with his leg extended on the track would appear to be far more remote than the probability that the decedent, in the instant case, would conduct himself as he did.

In the majority opinion, the Court below attempts to wave the MOSTYN case aside by making a distinction without a distinction. The learned court suggests that in the MOSTYN case, if the engineer had looked as he was required, he would have discovered the danger, whereas in the instant case, the engineer "did look" and discovered Eckenrode in a safe position. That is an incorrect statement of fact. The engineer did not look at all from the time he first shut off the power until after he had re-applied it. That this is true may be found by reading Judge Kirkpatrick's opinion in the District Court where he said, "* * * concededly, he did not look out the side window."

From the time when Sunderlin last closed the throttle prior to the time of the fatal re-application of the throttle, there was an intervening period within which the lap and lead lever did not move. It is of no moment that Sunderlin *once* saw the deceased in a position of safety. What we are concerned with is what he could and should have seen, had he looked immediately prior* to the fatal re-application of the throttle. Particularly are we concerned with this, in

---

* In footnote 5 of Judge O'Connell's dissenting opinion he said, "I consider it immaterial whether Sunderlin had a duty to observe Eckenrode **continuously.** For purposes of this case, plaintiff need only establish that Sunderlin failed to observe Eckenrode at a time when he had a duty to do so."

view of the comment of the deceased of his intention to assist in getting the train started. This we know. Had he looked, Sunderlin could not help but see the deceased carrying sand to the train.

The question is whether, even after Sunderlin had seen the deceased in a position of safety, there was a continuing, if not continuous, duty of maintaining a lookout before reinstating the power, especially in view of the possibility of serious harm in the light of the size and character of the instrumentality involved in this case.

What is more, as was pointed out by Judge O'Connell in his dissenting opinion, it was for the jury to say whether there was not indeed a duty to "hang out" the window instead of merely looking out the window, although, concededly, either would have revealed the hazard in which the decedent was placed by the restoration of power. The learned trial judge, after pointing out that the decedent's hazard could have been observed had Sunderlin looked out the window, left to the jury the determination of whether or not there was a duty on the part of the engineer to maintain such a lookout. He said, "That is a question for you. I am going to leave that entirely to you * * * I shall leave it to the jury to say whether his failure to look out the side window was or was not negligence."

In this case, a discerning and extremely intelligent jury was given a series of interrogatories (11) which they answered with care and discrimination. They found no violation of the Safety Appliance Law. They found the decedent guilty of contributory negligence. They found the engineer guilty of negligence in not looking out for the decedent—a specific finding of fact! They cut the full loss of damages right in half and awarded the widow $10,000.00. As was pointed out by Judge O'Connell, although the majority would not accept the jury's findings on the existence of negligence in this case, nevertheless, it was willing to, and did accept the jury's finding that there was no violation of the Safety Appliance Law in relation to the sanders. Certainly there is no justification for such inconsistency.

The jury's findings on the existence or non-existence of fault in this case should have been accepted in whole or not at all.

The Court, in affirming the N. O. V., viewed as improper the above action of the trial judge in sending the case to the jury. It then went on to say:

> "The point we are making does not involve assumption of risk. That is out of this law. Nor does it involve contributory negligence. The jury has found that Eckenrode was contributorily negligent. We are not at all sure that that finding could be sustained for it is just as *speculative* as is a negligence charge against the company. What we are talking goes to the very foundation of liability. * * *
>
> "* * * But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test *honestly and not to pretend that there is negligence when it does not exist.* It does not exist in this case." (Italics ours.)

It was the inacceptability of the alleged speculativeness that prevented the Circuit Court from reinstating the verdict for petitioner in this case. But this line of reasoning "flies directly in the face" of the decisions of this Court in a now long line of cases including TENNANT v. PEORIA & P. U. R. CO., 321 U. S. 29, 64 S. Ct. 409 (1944); BAILEY v. CENTRAL VT. RY., 63 S. Ct. 1062, 319 U. S. 350, 87 L. Ed. 1444 (1943); LAVENDER v. KURN, 327 U. S. 740 (1946), 66 S. Ct. 740; MYERS v. READING CO., 67 S. Ct. 1334 (1947), 331 U. S. 477; LILLIE v. THOMPSON, Tr., 68 S. Ct. 140 (1947).

In LAVENDER v. KURN, supra, the Court said:

> "It is no answer to say that the jury's verdict involved *speculation* and *conjecture*. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of

speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Italics ours.)

In BAILEY v. CENTRAL VERMONT RY., supra, the Court said:

"* * * reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries * * * To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In TENNANT v. PEORIA & P. U. R. CO., supra, this Court said:

"In holding that there was no evidence upon which to base the jury's inference as to causation, the Court below emphasized other inferences which are suggested by the conflicting evidence * * * It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact-

finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts * * *. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

This Court further went on to say so aptly in that case:

"* * * No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

The same is especially true in the instant case where the evidence in favor of the petitioner is so much more potent.

Although petitioner relied upon all of these cases; and although, obviously, all of the Court below discussed these cases in the conferences prior to the decision, since the dissenting judge mentions them by name and finds them to be "indistinguishable in principle" from the instant case; and although the dissenting opinion also stated, "In view of what I deem the clear mandate of the Supreme Court, as expressed in Lavender v. Kurn, 327 U. S. 645 (1946); Myers v. Reading, 331 U. S. 477 (1947), and Lillie v. Thompson, U. S. (decided November 24, 1947), * * *"; nevertheless, the majority of the Court below made no effort to distinguish them. They did not even honor them by mention, nor, do we submit, did they follow them.

What is the test of negligence and who is to decide its existence? Decades ago, this Court, in JAMISON, et al. v. ENCARNACION, 281 U. S. 635, 50 S. Ct. 440, said:

"The Act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word may be read to include all the meanings

given to it by courts and within the word as ordinarily used. MILLER v. ROBERTSON, 266 U. S. 243, 248, 250."

The error in the reasoning of the majority of the Court below is that exact error which the judges of the Circuit Court of Appeals for the 8th Circuit in FLEMING v. HUSTED, 164 F. 2d 65 (1947), at page 67, warned against in arriving at the true concept of the meaning of the word "negligence." The Court there said:

"* * * Under the expressions and indications in the recent decisions of the Supreme Court, there is no right on the evidence to regard it as an absolute, which was entitled to be disposed of as a matter of law. See e. g. Bailey v. Central Vermont Ry., 319 U. S. 350, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 33, 64 S. Ct. 409, 411, 88 L. Ed. 520; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. Cf. also Chicago & N. W. R. Co. v. Grauel, 8 Cir., 160 F. 2d 820. The earlier cases, such as Delaware, L. & W. R. Co. v. Koske, 279 U. S. 7, 49 S. Ct. 202, 73 L. Ed. 573; Missouri Pac. R. Co. v. Aeby, 275 U. S. 426, 48 S. Ct. 177, 72 L. Ed. 351, and Nelson v. Southern Ry. Co., 246 U. S. 253, 38 S. Ct. 233, 62 L. Ed. 699, upon which the trustees rely, may not be read apart from these later decisions. *Perhaps, also, the concept of negligence in the earlier cases and the court's admeasurement of the duty owed therein can be said to have contained some unconscious or other subtractings, from the interplay of the then-existing doctrine of assumption of risk.*" (Italics ours.)

We submit that the majority below has now repeatedly shown, and in the instant case reiterated, "unconscious or other subtractings, from the interplay of the then-existing doctrine of assumption of risk" in arriving at this "concept of negligence" and the "duties owed therein," contrary to

the Amendment of 1939 which excised assumption of risk *in toto* from the law. Compare its ruling in MYERS v. READING CO., 155 F. 2d 523 (1946), reversed in this Court, supra, and PITT v. P. R. R., 161 F. 2d 733 (1947), where the entire Third Circuit bench of six judges sat and affirmed the decision by the District Court judge in favor of the plaintiff (66 F. Supp. 443) only by an equal division of the Court. Compare also, MEYONBERG v. P. R. R. (3 Cir.) decided December 19, 1947, affirming judgment for plaintiff (Opinion by O'Connell, Jr., dissent by Goodrich, J.).

It is this conflict in the concept of "negligence" within the bench itself in this Circuit which requires clarification and correction by the grant of certiorari here. *The outcome of a case should not depend upon which three of the six judges in this Circuit happen to be sitting.*

The majority opinion as written by the judges who happened to be sitting in this case followed with amazing similarity of reasoning and expression the language of the dissenting opinion in JOHNSON v. U. S., decided in this Court February 9, 1948, contrary to what this Court has now once again reaffirmed to be the true precept which should be followed in this type of case, as expressed in the majority opinion in that case. Only certiorari can correct what we submit was clear error in this matter now before the Court.

The Second Circuit in the MOSTYN case, supra; found no such difficulty in a much closer case. A judge of the Court below, felt himself obligated to follow the mandate of this Court in its recent decisions on this question of law.

The majority in the Court below either has not recognized the long and universally accepted meaning of "negligence" in these cases or has declined to follow them. It refused to give the Federal Employers' Liability Act, 45 U. S. C. A. 51, et seq., the liberal interpretation Congress intended.

The petition for certiorari should be granted.

Respectfully submitted,

JOHN H. HOFFMAN and
RICHTER, LORD & FARAGE,
By: B. NATHANIEL RICHTER,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

No. 28

October Term, 1947.

1948

JULIA ECKENRODE, Administratrix of the ESTATE OF JOHN HENRY ECKENRODE, Deceased,
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PHILIP PRICE,
OWEN B. RHOADS,
H. FRANCIS DE LONE,
13th Floor, Packard Building,
Philadelphia 2, Penna.,
Attorneys for Respondent.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO BRIEF.

TABLE OF CASES CITED.

STATUTES AND AUTHORITIES CITED.

IN THE

Supreme Court of the United States.

No. 628.

October Term, 1947.

JULIA ECKENRODE, ADMINISTRATRIX OF THE ESTATE OF JOHN HENRY ECKENRODE, Deceased,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 149a) is reported in 71 F. Supp. 764. The opinions of the Circuit Court of Appeals for the Third Circuit (R. 184, 213) are reported in 164 F. 2d 481, 996.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

QUESTION PRESENTED.

Whether the Circuit Court of Appeals erred in affirming the entry of judgment for respondent where there was no evidence to sustain a finding that the engineer of respondent's train was negligent in not continuing to observe the flagman who was last seen by the engineer walking

away from the track on which the train was being operated, at a time when the flagman had no duties to perform in connection with the movement of the train and gave no indication that he would place himself in proximity to the engine which caused his death?

STATUTE INVOLVED.

Section 1 of the Federal Employers' Liability Act (Act of April 22, 1908, Chapter 149, as amended by the Act of August 11, 1939; 45 U. S. C. A., Section 51) provides:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . "

STATEMENT.

Petitioner's decedent, John Henry Eckenrode, was fatally injured on October 8, 1943, at 12:10 p. m. on respondent's tracks between Hastings and Cresson, Pennsylvania. The witnesses, all of whom were called by the petitioner, were in complete agreement concerning the facts of the accident. However, petitioner's brief contains such serious mistatements and distortions of the uncontradicted testimony that a full statement of the facts is required.

The deceased was the flagman on a coal-shifting train of the respondent, which was operating on the day in question between Cresson and Hastings, Pennsylvania (R. 10a, 11a). The weather was clear and dry (R. 9a, 54a, 101a). The engine had just drawn four cars from the Hastings Fuel siding on to the main track and coupled the four cars so drawn to eighteen cars standing on the main track (R. 11a, 12a, 60a, 61a). The deceased, in the performance of his duties, had thrown the switch and coupled the cars

in this operation (R. 61a) and, after the operation was completed, had returned to the caboose where it was his duty to remain during the movement in question (R. 13a, 62a, 76a, 86a, 117a).

After the coupling was effected, the engine was standing approximately at the Hastings Fuel siding switch, facing in the direction of the twenty-two cars intended to be pushed, and was connected to the last of these twenty-wo cars, with the caboose located behind the engine (R. 11a, 12a, 40a, 101a). Looking in the direction in which the engine was facing, the Hastings Fuel siding track diverged to the right from the main track, forming a narrow "Y" so that it ran in roughly the same direction as the main track but slightly down-grade, whereas the main track ran upgrade. The distance between the Hastings Fuel track and the main track increased gradually from the switch point (Defendant's Exhibits 1, 2 and 3; R. 142a, 143a). Respondent's fireman, Sunderlin, who was a qualified engineer, was operating the locomotive and the regular engineer was acting as fireman (R. 27a, 28a, 100a, 116a). After the locomotive started to push the cars up the grade on the main track, the deceased left the caboose and walked past the engine on the right or engineer's side (R. 42a, 51a, 63a, 81a, 106a, 107a, 118a). At this time, the engine had moved along the main track (the left arm of the "Y") approximately fifty feet beyond the Hastings Fuel switch (R. 118a) and the deceased was on the Hastings Fuel track (the right arm of the "Y") a distance estimated as between seven and twelve feet to the right of the engine and three to five feet below it (R. 58a, 64a, 86a, 87a, 118a, Defendant's Exhibits 1, 2 and 3, R. 142a, 143a). As the deceased walked past the engine, he and Sunderlin had a conversation which was described by Sunderlin, corroborated by Ingoldsby (R. 42a, 63a), as follows (R. 118a, 119a):

"THE COURT: Tell him exactly what he said, just exactly as you can remember.

THE WITNESS: He said: 'Big boy, if you can't push them cars up I will get the bar and bar them.'

Did you want me to tell everything?

THE COURT: Tell everything that was said.

THE WITNESS: I said: 'Bull shit on this junk.'

Q. What did he mean by 'the bar'?

A. It is in the cabin car for breaking things down or any repairs that have to be made around the train.

Q. A crow bar, isn't it?

A. Yes, a crow bar.

Q. Have you ever seen a trainman use a bar to help move an engine up a grade?

A. No, sir.

Q. He was joking, was he not?

A. Yes, sir, so was I."

There was not a word of evidence to indicate that Eckenrode ever returned to the caboose in order to obtain a bar with which to push the engine. After their conversation the deceased was not again seen by Sunderlin until after his death (R. 107a). Deceased then walked on, beyond the moving train, on the Hastings Fuel track and, at a point approximately one hundred feet beyond the place where he had passed the slowly moving engine, turned to his left and started diagonally toward the embankment between the two tracks (R. 14a, 81a, 82a, 83a, 85a, 88a, 106a, 121a). In some unexplained manner, his head became caught between the lap and lead lever and the cylinder head located along the right side of the engine (R. 50a, Defendant's Exhibit 5, R. 143a).

The deceased had no duties to perform which required him at the time of the accident to be in any place other than the caboose, which was located behind the engine (R. 13a, 62a, 76a, 86a, 117a). The engine's whistle was blown and the bell was rung before the move from the Hastings

Fuel switch was started (R. 80a, 97a, 101a, 105a), and from that time until the time petitioner's decedent was killed, the engine and train were in one continuous movement, although the engine slipped and skidded and went backward and forward during this movement due to the grade of the main track (R. 53a, 98a, 106a, 120a).

Sunderlin, when operating the engine from the engineer's position and looking forward through the front window of the engine, could not see along the right side of the engine because of the running board located about six feet above the ground along that side of the engine (R. 50a, 119a, 120a) and even looking out of the side window of the engine, could not see the area within two or three feet of the side of the engine without leaning out the window (R. 46a, 47a).

The case was submitted to the jury in a charge and interrogatories which embodied every theory of liability advanced by petitioner at the trial (R. 145a, 146a, 159a-179a), and the jury's verdict for the petitioner was based solely on the negligence of Sunderlin in not seeing Eckenrode after their conversation (R. 145a). The jury concluded that if Sunderlin had watched Eckenrode he should have done something which would have avoided the accident (R. 145a). The jury rejected all other contentions of the petitioner concerning respondent's negligence (R. 145a, 146a). The trial judge subsequently set aside the jury's verdict, reasoning that the evidence failed to show that Sunderlin was under a duty to keep Eckenrode under observation and that there was no causal connection between the negligence found by the jury (Sunderlin's nonobservance of Eckenrode) and Eckenrode's death (R. 149a-156a). Petitioner appealed to the Circuit Court of Appeals for the Third Circuit, which affirmed, *per curiam* (R. 185). A petition for reargument in that court was granted (R. 212) and, after the reargument, the decision of the District Court was again affirmed, with one dissent (R. 213).

ARGUMENT.

At the outset, it should be noted that all of the evidence was presented by the Petitioner, with the exception of testimony concerning the operation of the engine's sanders, which is not in issue here since the jury found that the sanders were operating properly; and with the exception of photographs of the locale of the accident and the type of engine involved, the accuracy of which was not questioned. There was no dispute or conflict betweeen the various witnesses called by the petitioner concerning the manner of the happening of the accident. However, as shown below, petitioner's brief contains numerous misstatements and distortions of the uncontradicted evidence.

I. The Evidence Was Insufficient to Warrant Submission to the Jury of the Issue of Respondent's Negligence.

On the issue of negligence, the uncontradicted evidence, viewed in the light most favorable to the petitioner, presents the simple question of whether or not there was any duty on the part of respondent's engineer to continue to observe the deceased, a fellow employee, after seeing him walking along an adjoining track which was somewhat beneath the level of the track on which the engine was running and which diverged away from the track on which the engine was running.

The deceased had no duties which required him to walk along the adjoining track much less to be anywhere near the engine at the time of his accident; in fact, it was his duty to remain in the caboose while the movement which resulted in his death was being made (R. 13a, 62a, 76a, 86a, 117a). The movement was being made in broad daylight on a clear day (R. 9a, 54a, 101a), and the deceased was fully aware of the movements of the train when last observed by the engineer, since at the time of that observation he walked alongside the engine and exchanged pleasantries with the engineer. Under these circumstances, it is submitted that,

although the engineer knew that Eckenrode was not in his proper position but rather was on an adjoining track, still he had no duty to continue observation of Eckenrode, at least until he had some notice that the deceased was about to place himself in a position of peril. **Chesapeake and Ohio Ry. v. Nixson**, 271 U. S. 218 (1926).

On the question of whether or not there was evidence of negligence, petitioner's arguments are based on a series of misstatements of the undisputed evidence. The misstatements in the petition and brief, concerning the evidence of negligence, fall into three general categories which may be summarized as follows:

1. *The Stopping and Starting of the Engine and Its Mechanisms.*

It is repeatedly asserted throughout petitioner's brief that the engine and train stopped and then started and that the lap and lead lever came to a full stop and then started on a reapplication of power (Petitioner's brief, pp. 5, 9, 10, 14, 15).

The evidence is clear that the train and engine were in constant motion from the time they left the Hastings Fuel switch until the time that Eckenrode was killed. All the members of the train crew testified that the engine did not stop during the course of the push upgrade, although when the wheels skidded the train hesitated or even dropped back momentarily until traction was obtained (R. 53a, 98a, 106a). As to the movement of the lap and lead lever, the only testimony concerning it was the testimony of the brakeman, McGowan, who pointed out that when the engine skidded and stopped going forward the lever moved fast, whereas when the engine was going forward the lever moved slowly (R. 89a, 90a). Thus, the only testimony on this point is flatly contradictory to the statement or assumption made by the petitioner that when forward motion stopped the lever became motionless.

2. *The Direction in Which Eckenrode Was Walking When Last Observed by the Engine Crew.*

Petitioner asserts, repeatedly, that the deceased was observed by the acting engineer, the regular engineer, and the brakeman walking "toward" the train (Petitioner's brief, pp. 5, 6, 9).

In making these statements, petitioner makes no distinction between the testimony of the brakeman, McGowan, and the testimony of Sunderlin, the acting engineer, and Ingoldsby, the acting fireman. McGowan was located at the head of the twenty-two-car train, more than one thousand feet away from the engine (R. 78a, 14a); Sunderlin and Ingoldsby were in the cab of the engine (R. 42a, 100a). McGowan observed Eckenrode subsequent to the time Eckenrode was last seen by Sunderlin and Ingoldsby, but there was no showing that his observation was or could have been communicated to the engineer. Sunderlin and Ingoldsby both testified that when they last observed the deceased, as he walked past the engine, he was proceeding along the Hastings Fuel siding track, which ran roughly parallel to the course of the engine but diverged away from the track on which the engine was moving (Defendant's Exhibits 1, 2 and 3—R. 142a, 143a; R. 51a, 52a, 63a, 64a, 106a, 107a, 118a). Petitioner attempts to distort isolated words in the testimony of these two witnesses into testimony that they last observed Eckenrode walking toward the train, whereas their testimony was merely that he was walking *on the Hastings Fuel siding track* in the same general direction as that in which the train was running (R. 51a, 52a, 63a, 64a, 106a, 107a, 118a).

3. *The Conversation Between Eckenrode and the Acting Engineer.*

Petitioner urges that the conversation which occurred between Eckenrode and the acting engineer, as Eckenrode walked past the engine, gave notice to the engineer that

Eckenrode planned to come into proximity with the engine in endeavoring to help it up the hill (Petitioner's brief, pp. 5, 9, 11). Thus, it is stated that "deceased had specifically told the engineer that he was going to do something about moving it" (Petitioner's brief, p. 11).

The conversation between Eckenrode and the acting engineer, Sunderlin, is set forth above (supra, p. 4). A reading of the conversation leaves no doubt that it was merely a joke between the deceased and the engineer. It is submitted that the trial judge properly disposed of petitioner's contention by stating that it could not be seriously considered (R. 153a). It is not contended that the deceased made any effort to obtain a bar with which to bar the engine, or that he was hurt in barring the engine, so that the argument that the conversation put the engineer on notice that the deceased planned to do whatever he was doing when he met his death is specious. The impossibility of one man's using a crow bar to assist a locomotive in pushing twenty-two loaded freight cars up a grade is manifest.

In a similar vein, petitioner asserts that, at the time of the accident, Sunderlin, the acting engineer, knew that the deceased was no longer in the caboose but was "participating in completing the shifting move" (Petitioner's brief, p. 9). The testimony of all of the witnesses was to the effect that petitioner's duties in connection with the movement were completed when the cars were coupled, that it was his duty to remain in the caboose thereafter (R. 13a, 62a, 76a, 86a, 117a), and that, when last observed by Sunderlin, the deceased was walking away from the engine along the Hastings Fuel siding track (R. 51a, 52a, 63a, 64a, 81a, 82a, 85a, 106a, 107a, 118a).

It is accordingly submitted that the evidence in the instant case, as it actually appears in the notes of testimony rather than as it is stated in petitioner's brief, failed to

establish any facts sufficient to raise a duty on the part of the acting engineer to keep the deceased under continuous observation.

II. The Circuit Court's Decision Is Not in Conflict With the Decisions of This Court, Nor Is There an Irreconcilable Conflict and Division Among the Judges of the Circuit Court as to the Meaning of Negligence.

Petitioner asserts that the decision of the Circuit Court is in conflict with recent decisions by this Court and by the Circuit Court of Appeals for the Second Circuit (Petitioner's brief, pp. 8, 13, 16). This contention is based on the claim that the Circuit Court found the verdict for the petitioner speculative (Petitioner's brief, p. 16). However, the portion of the Circuit Court's opinion relied on to demonstrate this proposition, in the parts which are deleted from the quotations appearing in petitioner's brief (p. 16), makes it clear that speculativeness was not the basis for the decision. Thus, the court below pointed out that it was not concerned with assumption of risk or with contributory negligence (as to which, the court commented on the speculative nature of the evidence) and went on to state (R. 218):

> "What we are talking goes to the very foundation of liability. It has to do with the duty of Sunderlin, in charge of the operation of the engine, to take precautions against an experienced fellow member of his train crew acting in a wholly unexpectable and unreasonable fashion. We see nothing on which any charge against the company based upon carelessness of the locomotive's crew could possibly be sustained."

Thus, it is clear that the Circuit Court affirmed the entry of judgment for the respondent not because the verdict was speculative, but rather because of the complete absence of probative facts to support the jury's conclusion that the respondent was negligent.

The recent decisions of this Court cited by the petitioner do not conflict with the decision of the Circuit Court in the instant case in the legal principles for which they stand or in the application of those principles to the facts of the particular cases. Thus, in *Bailey v. Central Vermont Ry.*, 319 U. S. 350 (1943), it was held that the evidence was sufficient to sustain a finding of negligence because of the failure to supply a safe place to work, where there was evidence that the operation there involved could readily have been performed in a safer manner, which would have avoided the injury.

In *Tennant v. Peoria & P. U. Ry.*, 321 U. S. 29 (1944), it was conceded that petitioner's decedent was killed in the course of a switching operation and that no bell had been rung or signal given when the movement was started. There was conflicting evidence as to whether or not respondent's rules required the ringing of a bell. The principal question was whether or not the admitted failure to ring the bell was causally connected with the death of petitioner's decedent. The answer to this question depended on where the decedent was located at the time of his death, and as to this the evidence and inferences to be drawn from the evidence were in conflict. This Court, in holding that the evidence was sufficient to warrant submission of the case to the jury, merely recognized that the conflict in the evidence as to negligence, and the conflict in the evidence and inferences as to causation, should be resolved by the jury.

Lavender v. Kurn, 327 U. S. 645 (1946), is another case where it was held that the jury must resolve the conflicts in the evidence and inferences to be drawn therefrom concerning the cause of the accident. In that case, the inferences to be drawn from the evidences suggested two entirely different manners in which the accident might have happened, and this Court held that the fact that an element of speculation was involved in the jury's determining which had occurred was not a proper basis for the entry of judgment for the respondent.

In addition to these cases, petitioner cites *Myers v. Reading Co.*, 331 U. S. 477 (1947), which was merely a decision on the *quantum* of evidence necessary to show a defective appliance within the meaning of the Safety Appliance Act, and did not involve in any way the question of proof of negligence; *Lillie v. Thompson*, 68 S. Ct. 140 (1947), where it was held that it is negligent for an employer to fail to guard its employees from foreseeable criminal acts by third persons; and *Johnson v. U. S.*, U. S. (decided, February 9, 1948), which involved the question of whether or not the doctrine of *res ipsa loquitur* was applicable to a suit by a seaman for personal injuries. Thus, it is readily observed that none of these three cases has any bearing on the question of whether or not the evidence concerning negligence in the instant case was sufficient to sustain a verdict for the petitioner. The Safety Appliance Act is not involved in the instant case, there is no question of criminal action by non-employees, and it is not contended that the *res ipsa loquitur* principle is applicable to the facts of the instant case. It is submitted that the Circuit Court's decision, in the instant case, is in harmony with the recent decisions of this Court cited by the petitioner, insofar as those cases have any bearing on the questions here presented, and that, in fact, the instant case is governed and controlled by the recent decision of this Court in **Brady v. Southern Ry. Co., 320 U. S. 476 (1943)**, where it was stated (p. 479):

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict, or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

This case differs from many of the cases recently decided by this Court, since, here, there was full and uncontradicted testimony concerning the actions of the deceased leading up to his death. There is no question of usurping the function of the jury, since there was no dispute between the various witnesses concerning the facts of the accident. There is no question of conflicting inferences from the testimony as to what actually happened, so that the jury's province in this regard has not been invaded. The only possible field for speculation in the instant case was speculation as to why Eckenrode placed himself in such close proximity to the engine and as to what happened in the seconds after he was last seen by the front brakeman approaching the track on which the engine was moving and before the moment when his head was struck by the mechanism of the engine. But the facts as to his movements and the engineer's knowledge of his movements were all established without contradiction, and it was on the basis of these facts alone that the jury found for the petitioner and, correspondingly, that the determination was made by both of the courts below that there was no evidence to sustain a finding that respondent violated any duty which it owed to the deceased.

Petitioner asserts that there is a conflict between the decision in the instant case and the decision of the Second Circuit in *Mostyn v. Delaware, L. & W. R. R.*, 160 F. 2d 15 (C. C. A. 2d, 1947). In that case, the majority opinion written by Judge Learned Hand clearly recognized that there cannot be negligence "in the air," and that whether or not the conduct complained of gives rise to a cause of action depends on whether or not it is negligent as to the person or class of persons who are harmed. **Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928).** But it was reasoned that the conduct of the defendant there involved was negligent as to the plaintiff, since defendant had reason to anticipate plantiff's presence at the place

of danger.[1] As is stated in Section 281 (b), comment c, of the Restatement of Torts, which was cited with approval by Judge Hand:

> "If the actor's conduct creates a recognizable risk of harm only to a particular class of persons, the fact that it causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not render the actor liable to the persons so injured."

The decision of the court below is merely an application of the principle recognized by Judge Hand in the *Mostyn* case (R. 218). The conflict asserted by the petitioner is, accordingly, illusory.

In applying, to the facts of the instant case, this principle, which was stated with such clarity by Justice Cardozo in the **Palsgraf** case and which is now codified in

---

[1] In the *Mostyn* case, it was held that there was evidence of negligence to submit to the jury where it appeared that the defendant had notice that plaintiff might be asleep on the tracks and failed to maintain a proper look-out for the plaintiff. Judge Hand, in his opinion, recognized that the failure to maintain a lookout is evidence of negligence only as to persons who might be expected on the tracks, saying (160 F 2d 15, 18):

> "It might have been possible to argue, although the likelihood that men might be crossing the track was ground for raising a duty towards them, Mostyn, who lay asleep beside the track was not within the class to which that duty was owed and could not take advantage of its breach, even though he would have escaped had the duty been performed. However, Mostyn testified that two of his supervisors had suggested that the men should sleep outside; and *hence the duty was not limited to those who were crossing the track*. The jury was free to find—indeed could scarcely have avoided finding—that even the most casual lookout would have discovered Mostyn lying where he was; . . ." (Emphasis supplied.)

the Restatement of Torts, it is seen that respondent would owe a duty to persons crossing its track, if it had reason to anticipate their presence on the track, and a failure of the engineer to keep a look-out ahead would constitute negligence as to persons of such class who were run down because of the failure to maintain such a look-out. Conversely, respondent owed no duty to a flagman observed walking at the side of the engine along a roughly parallel, but divergent, track which was separated from the track on which the engine was running by an embankment several feet high, at a time when the flagman had no duties to perform in connection with the moving train. The flagman's presence close to the *side* of the engine could not be anticipated. Any failure to keep such person under continued observation, or any failure to maintain a look-out along the area in *front* of the moving engine, would not constitute negligence as to such a person. Certainly, such a conclusion is inevitable under the facts of the instant case, where it was shown, by the uncontradicted evidence, that the deceased, when walking along the adjoining track, was fully aware of the movements of respondent's train.

Petitioner asserts, as a reason for the grant of certiorari, that there is a conflict within the Third Circuit, as to the meaning of negligence, as used in the Federal Employers' Liability Act (Petitioner's brief, pp. 8, 19, 20). To illustrate this point, three decisions of the Circuit Court of Appeals for the Third Circuit are cited. The first of these, *Myers v. Reading Co.*, 155 F. 2d 523 (1946), [reversed 331 U. S. 447 (1947)], was a unanimous *per curiam* decision involving the question of the *quantum* of evidence necessary to show that a hand brake was inefficient, within the meaning of the Safety Appliance Act. The second, *Pitt v. P. R. R.*, 161 F. 2d 733 (1947), was decided by a divided court, consisting of five of the circuit judges and one district judge, and involved the questions of whether the finding by a trial judge (the case having

been tried without a jury) that a particular hammer was not a safe tool for driving nails was "clearly erroneous" within the meaning of Federal Rule of Civil Procedure 52, and whether the trial judge improperly admitted and considered expert testimony on the point, the qualifications of the expert having been attacked. The third case cited by petitioner, *Meyonberg v. P. R. R.*, 165 F. 2d 50 (C. C. A. 3d, 1947), was decided in an opinion by one of the judges of the Third Circuit, who was joined by Judge Stephens of the Ninth Circuit, sitting specially, with a dissent by another of the judges of the Third Circuit. It was not a suit under the Federal Employers' Liability Act, but rather involved the New Jersey law concerning the duty of a carrier towards passengers. Thus, the cases cited by the petitioner fail to show any conflict among the members of the Circuit Court of Appeals for the Third Circuit, much less "an irreconcilable conflict and equal division" (Petitioner's brief, p. 8) within that court concerning the meaning of negligence as used in the Federal Employers' Liability Act or concerning the question of the type of evidence sufficient to establish negligence under that act. On the contrary, none of the cases cited by the petitioner dealt with or were concerned with this question.

III. There Was No Evidence to Sustain a Finding That Any Negligence of the Respondent Caused or Contributed to the Injury.

Judgment after the verdict was entered for the respondent, in the District Court, not only because there was no evidence of negligence, but also because the evidence failed to show any causal connection between the claimed negligence (the failure to keep Eckenrode under continuous observation) and the accident (R. 154a, 155a, 156a). The Circuit Court recognized the validity of the reasoning of the district judge on this point (R. 218).

If, under the evidence, it could be held that there was any duty on the part of the acting engineer to observe the movements of the deceased after their conversation, the question of what opportunity he had to make such observation is, of course, important. It appeared that there were two windows on the engineer's side of the train, one small window in the front of the cab of the engine, and a larger window on the side of the cab (Defendant's Exhibit 4, R. 143a; R. 44a, 102a). Throughout the petitioner's brief, it is stated, in one form or another, that if the acting engineer had looked he could have observed the deceased and could have seen sand in the deceased's hands (Petitioner's brief pp. 4, 5, 6, 9, 10, 13, 15). In many of these statements, no distinction whatsoever is made between the view available to the acting engineer from the front window and the view available to the acting engineer from the side window. For example, it is stated that "concededly had the engineer maintained a look-out, he would have had the decedent within his constant full view (108a)" (Petitioner's brief, p. 13).

The uncontradicted evidence was that a person looking out the front window of the engine from the engineer's position could not see to the right of the engine, in the direction from which Eckenrode approached (R. 50a, 119a, 120a) and that a person walking along side the engine could not be observed unless he was more than two or three feet away from it (R. 46a, 47a). The portion of the testimony relied on by the petitioner in support of the statement that if he had looked the enginer would have had the decedent within his constant full view related to the testimony of the engineer as to the deceased's position, when he was found after the accident approximately five feet to the right of the track, with his feet extending on down the bank (R. 50a, 120a). It was only as to his ability to observe the deceased's body when in this position that the acting engineer stated that there was nothing to block his

view out of the *side* window (R. 107a, 108a). There was no evidence whatsoever concerning whether or not it would have been possible to observe sand in the deceased's hands from the engineer's position.

The accident in the instant case could not have occurred unless Eckenrode, in some manner, placed his head between the lever and the cylinder head, where it was crushed—in other words, he could only be hurt by putting himself into the path of the moving machinery of the engine. Merely standing alongside the moving engine or walking within a foot or two of the engine could not have caused him any injury, and observation from the front window would not have disclosed Eckenrode's presence anywhere near the side of the engine (R. 50a, 119a, 120a). Petitioner asserts that Sunderlin was driving blindly (Petitioner's brief, p. 6) although Sunderlin testified that he was looking out of the front window of the engine (R. 102a, 103a, 119a). Whether or not there was a duty to look ahead for signals, which duty could have been discharged by observation from the front window, and whether or not this duty was discharged is immaterial in a case where a person walking along the side of the engine, who could not be seen as the result of such observation, was injured.

Thus, as to causation, the question presented is merely whether or not, even if there was a duty to continue to observe Eckenrode from the side window (the only window from which he could have been observed), observation from the side window would have prevented the accident. A person walking alongside the engine could not be observed when he was within two or three feet of the engine (R. 46a, 47a). Consequently, even if Sunderlin had kept Eckenrode in view from the time of their exchange of conversation until the time that Eckenrode climbed up the bank from the Hastings Fuel siding to the main track, Eckenrode would have gone out of sight when he was still two or three feet away from the engine, and such observation would have told

Sunderlin only that Eckenrode was walking diagonally toward the engine and, when last observed, was at a safe distance from the engine. Such observation could not have prompted any action on Sunderlin's part which would have in any way prevented the injuries which ultimately resulted through Eckenrode's placing himself in a position of extreme danger, or, perhaps, through Eckenrode tripping as he walked alongside the engine.

Plaintiff urges that if Sunderlin had observed Eckenrode approaching and the engine was stopped at the time, Sunderlin should not have again started the engine while Eckenrode was approaching the engine. Of course, the evidence is completely clear to the effect that the train and engine were in constant motion from the time the engine left the Hastings Fuel switch until the time Eckenrode was killed. The fact that the throttle was opened and closed in moving the engine, due to the effect of the skidding and going upgrade, does not alter the fact that the engine was in constant motion and that only one move is involved. It was testified by all the members of the crew that the engine and train did not stop during the course of the push upgrade, although when the wheels skidded, the train hesitated or even dropped back momentarily until traction was obtained (R. 53a, 98a, 106a, 120a). Thus, any argument founded on the proposition that the train was stopped is not supported by the testimony.

It was not disputed that Eckenrode knew of the movement of the train and the engine since he had conversed with the engineer and walked alongside of the engine in broad daylight while the engine was moving. Certainly, short of actually seeing Eckenrode get down and place his head within the mechanism of the engine, the engineer could have no reason to believe that Eckenrode would place himself in such a dangerous position. There was nothing inherently dangerous about walking near the engine, and even continuous observation of Eckenrode would have shown noth-

ing more than the fact that Eckenrode was walking in proximity to the engine. Thus, there was nothing to suggest the danger of Eckenrode's position to the engineer, and Sunderlin's failure to continue observation of Eckenrode cannot be regarded as a cause of the accident.

CONCLUSION.

The respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP PRICE,
OWEN B. RHOADS,
H. FRANCIS DE LONE,
Attorneys for Respondent.